STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., P.C., INTEGRATED HOSPITAL SPECIALISTS, P.C., INSIGHT ANESTHESIA, P.L.L.C., and STERLING ANESTHESIA, P.L.L.C.,

Plaintiffs-Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

/

Supreme Court No. 157951

Court of Appeals No. 340370

Genesee County Circuit Court No. 17-108637-NF

APPENDIX TO SUPPLEMENTAL BRIEF OF AMICUS CURIAE AUTO CLUB INSURANCE ASSOCIATION

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PENELOPE JEVAHIRIAN,

Plaintiff-Appellant,

v

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 27, 1999

No. 205577
St. Clare Circuit Court
LC No. 94-000425 NZ

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting partial summary disposition to defendant, pursuant to MCR 2.116(C)(10). Summary disposition was based on the trial judge's determination that the one-year-back rule of the no-fault act, MCL 500.3145(1); MSA 24.13145(1), barred plaintiff's reimbursement for replacement services, attendant care expenses and medical mileage incurred from the date of her accident, December 22, 1977, to one year prior to the filing of her lawsuit, February 22, 1993. We affirm.

A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Carlyon v Mutual of Omaha Ins Co*, 220 Mich App 444, 446; 559 NW2d 407 (1996). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court will consider all documentary evidence in the light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact that requires a trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff argues that the trial court erred in holding that the one-year-back rule was not tolled based on *Welton v Carriers Ins Co*, 421 Mich 571; 365 NW2d 170 (1984), and *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986). Together, these cases hold that the one-year-back rule is tolled from the time that an insured files a specific claim for benefits until the insurer denies the claim. *Lewis, supra* at 101; *Welton, supra* at 578. While plaintiff does not dispute that she failed to file a claim for benefits, she notes that defendant was on notice of her accident and her paraplegic injury. Based on

Johnson v State Farm Mutual Automobile Ins Co, 183 Mich App 752; 455 NW2d 420 (1990), plaintiff argues that defendant therefore had a duty to advise her of her entitlement to benefits for replacement services, attendant care and medical mileage, and that the one-year-back rule was tolled given defendant's failure to so advise her.

The Michigan no-fault insurance statute bars recovery of benefits for losses incurred more than one year preceding the commencement of an action to recover those benefits. MCL 500.3145(1); MSA 24.13145(1); *Welton, supra* at 576. However, this one-year-back rule is tolled from the date that an insured makes a specific claim for benefits until the date that the insurer formally denies liability. *Lewis, supra* at 101.

Notice of an injury that simply informs the insurer of the name and address of the claimant and the time, place, and nature of an injury cannot serve as the specific claim that triggers tolling because it does not inform the insurer of the expenses incurred, whether the expenses were covered losses, and whether the claimant would file a claim. *Welton, supra* at 579. Moreover, tolling of the one-year-back rule is only proper when the insured has sought reimbursement with reasonable diligence. *Lewis, supra* at 102.

Plaintiff relies on *Johnson, supra*, as authority for her claim of tolling. However the facts and circumstances of that decision distinguish it. It involved one insurer with two policies covering the decedent. While the decedent's wife claimed coverage under a motorcycle policy, she made no specific demand for no-fault survivor's loss under a separate policy covering an automobile until shortly before she began her action against the insurance company in circuit court. *Id.* at 754-755. This Court ruled that the plaintiff's notice of injury with respect to the motorcycle policy constituted sufficient notice of a claim for these benefits. *Id.* at 758-761. However, notice of the death was the only information the insurer needed to conclude that the plaintiff had an entitlement to the benefit, and this benefit, based primarily on wage loss, can generally be calculated easily. MCL 500.3108(1); MSA 24.13108(1). In contrast, the expenses for which plaintiff is seeking reimbursement, except for the replacement services figure, which is set at a fixed amount when such services are needed, are subject to flux in relation to the level of attendant care needed by plaintiff and the distance she would have to travel to get this care, which would vary over time. Furthermore, the plaintiff in *Johnson,* waited approximately only two and one-half years to file suit, *id.* at 755, while in the instant case, plaintiff did not seek these benefits for over sixteen years.

The trial court did not err when it ruled that *Welton* and *Lewis* were binding, and that *Johnson* did not control the outcome of this case. Plaintiff's application for benefits was not sufficient to act as a triggering event for tolling purposes. Further, plaintiff did not pursue reimbursement of her replacement services, attendant care and medical mileage expenses in a reasonably diligent manner. Plaintiff's claims for expenses incurred prior to February 22, 1993, are therefore barred by the one-year-back rule.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

JOEY EDWARDS and KATHY EDWARDS,

Plaintiffs/Counter Defendants/
Appellees,

v

CONCORD DEVELOPMENT CORPORATION, INC.,

Defendant/Counter Plaintiff/
Cross Plaintiff/Appellant,[1]

and

TIFFANY'S CONSTRUCTION COMPANY, INC.,

Defendant/Counter Plaintiff/
Cross Plaintiff/Appellant,

and

FLEET FINANCE, INC,

Defendant/Counter Plaintiff/
Cross Defendant/Appellee,

and

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant/Cross Defendant/
Appellee.

UNPUBLISHED
September 17, 1996

No. 174487
LC No. 91-010724

Before: Doctoroff, C.J. and Hood and Bandstra, JJ.

PER CURIAM.

Defendant Concord Development Corporation (Concord) appeals as of right from the trial court's judgment of no cause of action in favor of plaintiffs and the orders granting summary disposition in favor of defendants Hastings Mutual Insurance Company (Hastings) and Fleet Finance, Inc. We affirm.

After plaintiffs' home was severely damaged by fire, they entered into a fire repair agreement with Concord, in which Concord agreed to repair plaintiffs' home, in return for plaintiffs' assignment of insurance proceeds from their insurer, Hastings. Although Hastings paid plaintiff the actual cash value of the repairs on their home, plaintiffs' mortgage company, Fleet Finance, withheld a portion of the proceeds from Concord and applied it to plaintiffs' mortgage by order of the trial court. Because Concord did not complete the repairs on plaintiffs' home, plaintiffs brought an action against Concord for breach of contract. Plaintiffs also joined their insurance company (Hastings), their mortgage company (Fleet Finance), and Colonel Lee, an employee of Concord.[2] The trial court found that Concord breached the fire repair agreement by not completing work on plaintiffs' home and awarded damages to plaintiffs in the amount of $14,389.22, setting off plaintiffs' total damages by the value of work that was performed by Concord. The court granted summary disposition to Hastings and Fleet Finance pursuant to MCR 2.116(C)(10).

Concord first argues that the trial court erred in granting Hastings' motion for summary disposition because the assignment between plaintiffs and Concord was valid. We review grants or denials of motions for summary disposition de novo. *Lytle* v *Malady*, 209 Mich App 179, 183-184; 530 NW2d 135 (1995). Concord claims that Hastings was bound to include its name on the insurance draft that it issued to plaintiffs because the assignment of insurance proceeds from plaintiffs to Concord was legally valid and binding. That provision stated in pertinent part that plaintiffs "hereby give unto the CONCORD DEVELOPMENT CORPORATION, INC., all the necessary authority to have this fire loss adjusted and assigns to them the proceeds as payment in full for repairs." Hastings argues that the assignment was invalid and it was not bound by it because the contract it had with plaintiffs stated in relevant part that "[a]ssignment of this policy will not be valid unless we give our written consent" and Hastings did not give its written consent. However, Concord avers that non-assignment clauses are invalid and that even if they were valid, Hastings consented by virtue of its conduct in negotiating with its representative, Colonel Lee.

This Court has held that, as a general rule, contractual restrictions against assignability are strictly construed. *Stenke v Masland Development*, 152 Mich App 562, 575; 394 NW2d 418 (1986). However there is no prohibition against requiring consent to effectuate an assignment. *Hy King Associates v Versatech Mfg Industries*, 826 F Supp 231, 238-239; (ED Mich, 1993); *Kaczmarck v La Perriere*, 337 Mich 500, 504-506; 60 NW2d 327 (1953). The general presumption then is that a contractual right may be assigned, *Auto Electric & Service Corp v Rockwell Int'l Corp,* 111 Mich App 292, 300-301; 314 NW2d 562 (1981), but conversely that

assignment may also be precluded by agreement: "A contractual right can be assigned unless . . . assignment is validly precluded by contract." Restatement Contracts 2d, § 317(2).

Although plaintiff cites *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), to support its contention that non-assignment clauses are invalid, that case is distinguishable from the present case. In *Roger Williams*, the insurance company was attempting to avoid payment of its contract, whereas here, Hastings did not attempt to avoid its obligation under the contract; rather Hastings paid the full amount owed under the contract to plaintiffs. Thus, the provision requiring Hastings' written consent to assignment by plaintiffs was valid and, since Hastings did not give its written consent to plaintiffs' assignment of insurance proceeds to Concord, that assignment was not binding on Hastings.

Concord also argues that Hastings effectively consented to the assignment by virtue of negotiating the settlement amount with Lee. We disagree. We note that it does not appear that plaintiffs or Concord ever requested the consent of Hastings to the assignment. Concord claimed that it sent a copy of the fire repair agreement to Hastings and that Hastings was therefore on notice of the assignment when it dealt with Lee.

In *Hy King Associates, supra*, 826 F Supp 231, King agreed to be the exclusive sales representative of the defendant. King retired and transferred the stock in his corporation to Cozzi, who then acted as sales representative for the defendant for a brief period. The defendant claimed there was no valid assignment because it did not give its written consent as required by its contract with King. The court held that the defendant did not consent to the assignment because it did not recognize Cozzi as its sales representative, even though the defendant was enthusiastic about King bringing Cozzi into the business. *Id.* at 238.

Similarly, in the instant case, Hastings did not give its written or oral consent to the assignment. Rather, it dealt with Lee as a representative of plaintiffs for purposes of negotiating a settlement, but it continued to deal with plaintiffs at the same time. Edward Whalen, the insurance adjuster assigned to plaintiffs' claim, testified that he did not consider the assignment to be valid, and he dealt with Lee only as an agent of plaintiffs. We agree with the reasoning of *Hy King*, that such limited dealing with the purported assignee does not alone equate to consent.

Hastings contends that, even if the assignment to Concord was valid, Concord does not have any cause of action against it. An insured must actually repair, rebuild, or replace the property before the insurer becomes liable to pay the difference between actual cash value and replacement cost. *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 183; 490 NW2d 864 (1992). In this case, Concord did not complete the repairs on plaintiffs' home. Whalen testified that Hastings paid to plaintiffs $58,000 for the actual cash value of their home. Since there was no testimony that the actual cash value of plaintiffs home was more than $58,000 or that Hastings owed plaintiffs more money for the repairs, Hastings fulfilled its obligation to plaintiffs. Since an assignee receives only those rights which the assignor possessed, Concord would not have any claim against Hastings for additional money over what was paid for the actual cash value. *Damerau v CL Rieckhoff Co,* 155 Mich App 307, 313;

399 NW2d 502 (1986). Therefore, the granting of Hastings' motion for summary disposition pursuant to MCR 2.116(C)(10) was proper because there was no genuine issue of material fact regarding liability under the assignment clause of the fire repair agreement.

Concord further argues that Hastings acted with malice through its agent Whalen by ignoring the agreement between plaintiffs and Concord, while at the same time acknowledging that Concord, through Lee, represented plaintiffs in negotiating the settlement of their claim. Therefore, Concord asserts, Hastings should have been found liable for tortious interference with a contractual relationship.

> The elements of tortious interference with a contractual relationship are (1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant. . . .
>
> "One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another."
>
> . . . [A] defendant is not liable for tortious interference of a contract where he is motivated by legitimate personal or business interests. [*Wood v Herndon & Herndon Investigations, Inc,* 186 Mich App 495, 499-500; 465 NW2d 5 (1990).]

Hastings did not approve the assignment of insurance proceeds from plaintiffs to Concord. Therefore Hastings was not required to make any payments to Concord. Hastings took no action to interfere with the contract between plaintiffs and Concord. The reason that Concord was not paid from the insurance proceeds was that Fleet Finance intervened and held the proceeds in escrow. If Fleet Finance had not intervened, then plaintiffs would have been able to pay Concord with those proceeds. Thus, although Hastings did not include Concord's name on the insurance draft, they did not instigate a breach without legal justification and did not perform a wrongful act or a lawful act with malice for the purpose of invading the contractual rights of plaintiffs or Concord. Hastings only ignored the assignment which it was justified in doing for legitimate business reasons.[3] Accordingly, the trial court properly granted Hastings' motion for summary disposition because there was no genuine issue of material fact as to whether Hastings tortiously interfered with the contract between plaintiffs and Concord.

Concord next argues that the court's finding that Concord breached its contract with plaintiffs was clearly erroneous. We review findings of fact in a bench trial under a clearly erroneous standard, MCR 2.613(C), *Hoffman* v *ACIA,* 211 Mich App 55, 98, 101; 535 NW2d 529 (1995). A breach of contract is the failure to perform when performance is due. *Woody v Tamer*, 158 Mich App 764, 771; 405 NW2d 213 (1987). Plaintiffs argue that Concord breached the fire repair agreement by failing to complete the repairs on their home. Concord argues that plaintiffs were the ones that failed to perform under the fire repair agreement by not paying Concord for the work it performed on their home. On appeal, neither party disputes the existence of a contract.

The trial court weighed the credibility of the witnesses and determined that the testimony of plaintiffs and Whalen was more credible than the testimony of Colonel Lee. Whalen testified that in his twenty-eight years as an insurance adjuster, he has never paid a contractor before work has begun. Lee testified that even though he was not paid up front, he proceeded to work on plaintiffs' house and continued to do so even after his requests for payment were not honored. However, at some point, Concord ceased work on the house and the repairs were never finished. Whalen testified that a contractor is paid after the work is completed and that a contractor funds the repairs until that time. Thus, the court's finding that Concord breached its contract by not completing the work despite not being paid was not clearly erroneous.

Concord claims that the court considered the evidence of plaintiffs' understanding of the terms of the contract in violation of the parol evidence rule. Where a contract is clear and unambiguous, parol evidence of negotiations cannot be admitted to vary the contract. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 544; 362 NW2d 823 (1984). The parol evidence rule also bars admission of prior or contemporaneous agreements that contradict or vary the written contract. *Id.* Prerequisite to application of the parol evidence rule is a finding that the parties intended the writing to be a complete expression of their agreement. *Id.* Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question. *Id.* Parol evidence is also admissible to explain the terms of the contract and has application only after the terms of the agreement have been challenged. *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 171-172; 458 NW2d 56 (1990).

The contract between plaintiffs and Concord stated that "endorsement of the fire draft to the Concord Development Corporation, Inc., will be payment in full for all services rendered." The contract also contained a "draw down schedule" providing for payment installments of one-third up front, one-third after a third of the work is completed, eighteen percent after ninety percent of the work is completed, and the balance upon final completion. These two provisions are contradictory on their face. The former provision indicates that whatever money is paid by the insurance company in one check will be payment in full for the repairs. However, the latter provision requires payment installments. The parol evidence rule only bars extrinsic evidence if a contract is clear and unambiguous. *Central Transport, supra*. This contract was not clear and unambiguous because the two provisions contradict each other.

Furthermore, extrinsic evidence may be admitted to explain the terms of a contract. *Stefanac, supra*. Thus, plaintiffs' testimony as to their understanding of the contract was admissible to explain its terms. Both plaintiffs and Lee testified that Lee told them that the repairs would be paid for with the insurance proceeds in the form of a draft by the insurance company in the names of both plaintiffs and Concord. That evidence does not contradict the written contract. Plaintiffs further testified that Lee told them that the draw down schedule provisions did not apply to them. Accordingly, plaintiffs' testimony as to their understanding of the contract was proper to explain the terms of the contract.[4] Accordingly, because we are not left with a definite and firm conviction that a mistake was made, the trial court's finding that Concord breached its contract with plaintiffs and its award of $14,390 in damages was not clearly erroneous.

Next, Concord argues that the trial court erred in granting Fleet Finance's motion for summary disposition because Fleet Finance tortiously interfered with the contract between plaintiffs and Concord. However, the trial court correctly found that the elements of tortious interference were not met. First, although there was a contract between plaintiffs and Concord, Concord did not suffer a breach at the hands of plaintiffs. Furthermore, even if there was a breach, Fleet Finance did not instigate a breach without legal justification. The mortgage contract between Fleet Finance and plaintiffs provided that Fleet Finance was entitled to payment of the mortgage balance if their security interest in the home was impaired. The fire destroying plaintiffs' home caused such an impairment. However, instead of instantly applying the insurance funds to the mortgage balance, Fleet Finance negotiated with plaintiffs and entered into an escrow/loan construction agreement. The agreement would allow payment of the insurance funds toward repair of the home if certain conditions were met. Because there was no testimony that those conditions were met,[5] Fleet Finance was not obligated to make payments to Concord from the escrow fund. Since there was no indication that Fleet Finance had any motivation other than protecting its security interest in plaintiffs' home, and it adhered to the terms of its mortgage agreement with plaintiffs, there was no per se wrongful act on the part of Fleet Finance. Fleet Finance appeared to be motivated solely by the legitimate business interest of protecting its investment. Accordingly, there was no genuine issue of material fact that Fleet Finance tortiously interfered in the contract between plaintiffs and Concord, and the trial court properly granted summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] Although Concord is not listed as appellant, it is in fact the appellant.

[2] The trial court entered a judgment of no cause of action in Lee's favor, and no appeal was taken from that order.

[3] Moreover, as will be discussed below, the court properly held that plaintiffs did not breach their contract with Concord, therefore, the second element required for tortious interference with a contract has not been met.

[4] Concord does not explain in its brief why the court's award of damages was erroneous, other than addressing the issue in its question presented. However, the court's award of $14,390 to plaintiffs was not clearly erroneous because the court appeared to use reasonable calculations, based on the figures submitted into evidence by the parties, to arrive at that figure.

[5] Fleet Finance's counsel, during the hearing on its motion for summary disposition stated that Concord did not comply with the terms and conditions of the escrow agreement.

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

ALFRED M. KREINDLER,

Plaintiff/Counter-Defendant-Appellant,

and

DANIEL J. GOLDSTONE,

Plaintiff/Counter-Defendant,

v

MARTIN WALDMAN,

Defendant,

and

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
April 4, 2006

No. 265045
Oakland Circuit Court
LC No. 2004-055949-CK

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff Alfred M. Kreindler appeals as of right from the trial court's order granting summary disposition to defendant American Guarantee and Liability Insurance Company.[1] We affirm.

[1] Plaintiff Daniel J. Goldstone acted as an insurance agent for plaintiff Kreindler and allegedly failed to properly advise and maintain a disability insurance policy for plaintiff Kreindler's business. These individuals entered into a settlement agreement that assigned Goldstone's (continued...)

Plaintiff alleges that the trial court erred in concluding that Goldstone was not entitled to coverage based on the errors and omissions policy with defendant. Specifically, plaintiff alleges that there was a genuine issue of material fact with regard to whether Goldstone had uninterrupted professional liability coverage since 1996, a prerequisite for coverage under the policy, the policy was ambiguous, and the trial court erred in concluding that he had the burden of proof with regard to the issue of coverage. We disagree.

A trial court's decision granting summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Contrary to plaintiff's argument, the test is not whether a record *may* be developed upon which reasonable minds may differ, or whether the court is satisfied that the nonmoving party cannot prevail at trial because of a deficiency that cannot be overcome. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455, n 2; 597 NW2d 28 (1999). Once the moving party supports its position with documentary evidence, the nonmoving party has the burden of coming forward with evidence of specific facts to establish the existence of a material factual dispute. *Quinto*, *supra* at 362, 371. If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Id.* at 363.

In this case, plaintiff concedes that defendant's policy will not provide coverage for Goldstone's alleged negligence in handling plaintiff's disability insurance matter unless it can be established that Goldstone maintained uninterrupted professional liability coverage dating back to 1996. When the issue involves the question of coverage, plaintiff has the burden of showing that the insurance policy covers the matter alleged. *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375, 379; 622 NW2d 101 (2000). Further, because defendant supported its motion with documentary evidence demonstrating that there was a breach in coverage, plaintiff was required to come forward with evidence showing that there was a genuine issue of fact for trial in order to avoid summary disposition. *Quinto*, *supra* at 361-362.

Contrary to plaintiff's argument, the policy at issue is not ambiguous. Even if there was some confusion concerning Goldstone's contract date with another insurance company, this alleged confusion did not involve the meaning of defendant's policy. Furthermore, the alleged confusion is immaterial to the question of coverage because coverage under defendant's policy extends back only to the insured's contract date *or* the first gap in errors and omissions coverage, whichever is earlier. Because the negligent act occurred in 1996, well before Goldstone's gap in coverage—April 1, 2001, to August 1, 2001—and well before his contract date, it is immaterial whether Goldstone's contract date was September 2000, or September 2001.

(...continued)

claims against defendant insurance company to plaintiff Kreindler. Accordingly, the singular plaintiff refers to Kreindler and the singular defendant refers to the insurance company. The claims against defendant Martin Waldman are not at issue in this appeal.

Plaintiff failed to come forward with documentary evidence showing the existence of a genuine issue of material fact with regard to whether Goldstone had uninterrupted professional liability coverage dating back to 1996. Goldstone's mere assertion that he believed he had uninterrupted coverage, without any factual support for this position, was insufficient to show that a question of material fact exists. *Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003); see also *Quinto*, *supra* at 371-372. Indeed, Goldstone conceded that he could not produce any evidence showing that uninterrupted coverage was in place. Accordingly, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10).

Plaintiff also alleged that the policy at issue was ambiguous because it failed to define the term "proof," and therefore, must be construed against defendant as the drafter. The failure to define a contractual term does not render a contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). In that case, a term must be examined in light of its plain and ordinary meaning. The plain and ordinary meaning of a term can be ascertained by utilizing the dictionary definition. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). In the present case, defendant's representative indicated that any type of proof, including paycheck stubs, would be satisfactory. Plaintiff did not present any proof, but made a blanket assertion that he had obtained the required policy. Moreover, the rule of contra proferentem, the rule that construes a contract against the drafter, is a rule of last resort that does not apply unless there is a true ambiguity and the parties' intent cannot be discerned. *Twichel v MIC General Ins Corp*, 469 Mich 524, 535 n 6; 676 NW2d 616 (2004).

We reject plaintiff's argument that defendant was estopped from denying liability in this case. Although defendant initially agreed to defend Goldstone, it did so under an explicit reservation of rights. Because defendant timely notified Goldstone that it was proceeding under a reservation of rights, it is not estopped from denying coverage. *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999).

Furthermore, although the trial court did not address the question of plaintiff's standing, we agree that plaintiff lacked standing to pursue this action against defendant. Whether a party has standing is a question of law to be reviewed de novo. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002).

"[I]n order to have standing a party must have a 'legally protected interest that is in jeopardy of being adversely affected.'" *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992). In this case, plaintiff has no legally protected interest in defendant's policy, apart from whatever interest was assigned to him by Goldstone. Thus, plaintiff's standing, if any, arises by virtue of his agreement with Goldstone. While prohibitions against assignments are disfavored, where a clause prohibiting assignments is clear and unambiguous, it must be enforced as written. *Detroit Greyhound Employees Fed Credit Union v Aetna Life Ins Co*, 381 Mich 683, 689-690; 167 NW2d 274 (1969); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Here, defendant's policy expressly prohibited Goldstone's

assignment of his "claims and causes of action" under the policy.[2] Thus, plaintiff has no interest under the policy and, therefore, has no standing to sue defendant. This provides an alternative basis for affirming the trial court's summary disposition order against plaintiff.

In light of our decision, it is unnecessary to address whether plaintiff's claims against defendant were extinguished by his agreement with Goldstone.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[2] Goldstone's "claims and causes of action," if any, stem from his rights under the policy. Accordingly, there is no meaningful distinction between an assignment of Goldstone's "claims and causes of action," and an assignment of Goldstone's "interest" under the policy. A contrary result would render nugatory the policy's prohibition against assignments. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

APPENDIX D

STATE OF MICHIGAN

DEREK W. MONROE
JAMES L. WITTENBERG
DISTRICT JUDGES

GARY W. DOYLE
COURT ADMINISTRATOR

44TH DISTRICT COURT
300 EAST ELEVEN MILE ROAD
P.O. BOX 80
ROYAL OAK, MICHIGAN 48068
248.246.3000

April 28, 2015

Mr. David J. Lanctot
Scarfone & Geen, P.C.
241 East Eleven Mile Road
Madison Heights, MI 48071

RE: FOIA Request

Dear Mr. Lanctot:

I have received your FOIA request of April 23, 2015 asking for cases filed by Affiliated Diagnostics of Oakland and Fountain Park Pharmacy. Please be advised that the Judiciary is not considered a public body within the meaning of the Act (Section 15.232, Sec. 2.(d)(v)).

That said, and in a gesture of good will, I offer you the following:

Affiliated Diagnostics: 2011 (0), 2012 (0), 2013 (9), 2014 (69), 2015 (50)
Fountain Park Pharmacy: 2011(0), 2012 (0), 2013 (0), 2014 (60), 2015 (8)

Sincerely,

Gary W. Doyle
Court Administrator

RECEIVED
MAY 04 2015

STATE OF MICHIGAN

DISTRICT JUDGES
Hon. William C. Hultgren
Hon. Sam A. Salamey
Hon. Mark W. Somers

NINETEENTH DISTRICT COURT
19077 MICHIGAN AVENUE
DEARBORN, MICHIGAN 48126

Sharon E. Langan
Court Administrator
(313) 943-2070
Court Information
(313) 943-2080

Wednesday, April 29, 2015

David J. Lanctot
Scarfone & Geen, P.C.
241 East Eleven Mile Road
Madison Heights, MI 48071

Re: FOIA request

Dear Mr. Lanctot,

After extended research, the information you have requested is attached.

Please be advised that these numbers are as accurate as possible, however, essentially they are approximate.

If you have any further questions, please contact me at (313) 943-2056.

Sincerely,

Susan
Civil Clerk

Corporation	2011	2012	2013	2014	2015
Doctors Medical, LLC	0	0	32	41	1
Infinite Strategic Innovations, Inc.	0	0	66	121	1
Summit Medical Group, LLC	52	69	94	69	0
Summit Physicians Group, PLLC	0	0	14	157	28

As of April 29, 2015

STATE OF MICHIGAN
46th DISTRICT COURT

DISTRICT JUDGES

The Honorable
SHELIA R. JOHNSON
248-796-5810

The Honorable
DEBRA NANCE
248-796-5820

The Honorable
WILLIAM J. RICHARDS
248-796-5830

ADMINISTRATOR
CYNTHIA ARVANT
248-796-5805

CIVIL DIVISION
248-796-5870

CIVIL INFRACTION/
PARKING DIVISION
248-796-5860

MISDEMEANOR/
FELONY DIVISION
248-796-5840

PROBATION
DEPARTMENT
248-796-5850

TDD
248-354-3529

www.46thdistrictcourt.com

April 29, 2015

Mr. David J. Lanclot
Scarfone & Geen, P.C.
241 East Eleven Mile Road
Madison Heights, MI 48071

RE: FOIA Request

Dear Mr. Lanclot:

I am in receipt of your recent request under the Freedom of Information Act ("FOIA"), MCL 15.231 et seq. Courts are specifically excluded from the definition of a "public body" under FOIA, and are thus not subject to the Act. MCL 15.232(d)(v). Therefore, your request under FOIA is denied. However, the court's Local Administrative Order regarding Access, Inspection, Reproduction, and Creation of Court records provides that mail requests for information may be accommodated, based on availability of staff, if the request does not interfere with internal court operations. I was able to obtain the general information you requested, and have attached a chart with the data.

Because you have not requested copies and I was able to obtain the information you requested relatively easily, there is no cost associated with this request. Should you request further information, such as case numbers, case-specific information, or any information not contained in any existing records or reports, we would have to evaluate our ability to accommodate that request and determine the costs of providing the information sought.

Please be advised that MCR 8.119(H) permits you to come to this Court during business hours, Monday through Friday from 8:00 a.m. to 4:30 p.m., to inspect pleadings and papers in court files and obtain copies upon payment of the required costs.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

Cynthia M. Arvant
Court Administrator

RECEIVED
MAY 04 2015

Party	2011	2012	2013	2014	2015 YTD
Affiliated Diagnostics of Oakland	-0-	34	319	187	6
Bio-Magnetic Resonance Imaging, Inc.	1	-0-	3	17	-0-
Northland Radiology, Inc.	-0-	-0-	-0-	88	13

STATE OF MICHIGAN

FIFTEENTH JUDICIAL DISTRICT COURT

301 E. Huron St., P.O. Box 8650, Ann Arbor, MI 48107-8650

June 03, 2015

Scarfone & Geen, P.C.
Attorneys & Counselors
Attn: David J. Lanctot
241 East Eleven Mile Rd.
Madison Heights, MI 48071

Dear Mr. Lanctot:

This will acknowledge receipt of your FOIA request dated April 23, 2015 which was received by me yesterday due to clerk error. The employee who received and misplaced your request has been counseled. Even though the court is not subject to FOIA per MCL 15.232 Sec. 2.d. (v), I am responding to your request. No cases were found for 2011 or 2012; five cases were found for 2013; thirty-one cases were found for 2014; and twenty-one cases were found, to date, for 2015. Print outs of the case listings for Silver Pine Imaging, LLC are attached. For future, please note that public access is available online to 15th District Court records, filed on or after August 05, 2006, at www.15thdistrictcourt.org

Sincerely,

Suzyl Samborn
Court Administrator

Court 0

	Case	Type	Ply	Name	Opposing Party	Sts
1	13-2046	GC	P01	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	CLSD
2	13-2047	GC	P01	SILVER PINE IMAGING LLC//	AUTO CLUB INSURANCE AS	CLSD
3	13-2048	GC	P01	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	CLSD
4	13-2234	GC	P01	SILVER PINE IMAGING LLC//	GEICO GENERAL INSURANC	CLSD
5	13-2376	GC	P01	SILVER PINE IMAGING LLC//	AUTO CLUB INSURANCE AS	CLSD
6	14-0175	GC	P01	SILVER PINE IMAGING LLC//	AUTO CLUB INSURANCE AS	CLSD
7	14-0176	GC	P01	SILVER PINE IMAGING LLC//	AUTO CLUB INSURANCE AS	CLSD
8	14-0249	GC	P01	SILVER PINE IMAGING LLC//	TITAN INSURANCE COMPAN	CLSD
9	14-0359	GC	P01	SILVER PINE IMAGING LLC//	NATIONWIDE GENERAL INS	CLSD
10	14-0501	GC	P01	SILVER PINE IMAGING LLC//	MICHIGAN MUNICIPAL RIS	CLSD
11	14-0738	GC	P01	SILVER PINE IMAGING LLC//	CITIZENS INSURANCE COM	CLSD
12	14-0739	GC	P01	SILVER PINE IMAGING LLC//	21ST CENTURY PREMIER I	PEND
13	14-0740	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	CLSD
14	14-0921	GC	P01	SILVER PINE IMAGING LLC//	21ST CENTURY PREMIER I	CLSD
15	14-0922	GC	P01	SILVER PINE IMAGING LLC//	21ST CENTURY PREMIER I	CLSD

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	Case	Type	Pty	Name	Opposing Party	Sts
1	14-1282	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM AUTOMOBILE	CLSD
2	14-1326	GC	P01	SILVER PINE IMAGING LLC//	ESURANCE INSURANCE CO	CLSD
3	14-1402	GC	P01	SILVER PINE IMAGING LLC//	AUTO CLUB INSURANCE AS	CLSD
4	14-1501	GC	P01	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	PEND
5	14-1551	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	CLSD
6	14-1552	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	CLSD
7	14-1578	GC	P01	SILVER PINE IMAGING LLC//	AVIS RENT A CAR SYSTEM	PEND
8	14-1643	GC	P02	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	PEND
9	14-1642	GC	P01	SILVER PINE IMAGING LLC//	GEICO INDEMNITY COMPAN	CLSD
10	14-1656	GC	P01	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	CLSD
11	14-1657	GC	P01	SILVER PINE IMAGING LLC//	AUTO CLUB INSURANCE AS	CLSD
12	14-1658	GC	P01	SILVER PINE IMAGING LLC//	TRAVELERS INDEMNITY C	CLSD
13	14-1691	GC	P01	SILVER PINE IMAGING LLC//	AFFIRMATIVE INSURANCE	PEND
14	14-1708	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM AUTOMOBILE	CLSD
15	14-1905	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	CLSD

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Court 0

	Case	Type	Pty	Name	Opposing Party	Stat
1	14-2018	GC	P01	SILVER PINE IMAGING LLC//	GEICO INDEMNITY COMPAN	PEND
2	14-2132	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
3	14-2136	GC	P02	SILVER PINE IMAGING LLC//	GEICO INDEMNITY COMPAN	PEND
4	14-2162	GC	P01	SILVER PINE IMAGING LLC//	USAA CASUALTY INSURANC	PEND
5	14-2163	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
6	14-2164	GC	P01	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	PEND
7	15-0053	GC	P01	SILVER PINE IMAGING LLC//	21ST CENTURY ADVANTAGE	PEND
8	15-0095	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
9	15-0178	GC	P01	SILVER PINE IMAGING LLC//	GEICO INDEMNITY COMPAN	PEND
10	15-0250	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
11	15-0251	GC	P01	SILVER PINE IMAGING LLC//	ALLSTATE PROPERTY AND	CLSD
12	15-0425	GC	P01	SILVER PINE IMAGING LLC//	GEICO GENERAL INSURANC	PEND
13	15-0426	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
14	15-0427	GC	P01	SILVER PINE IMAGING LLC//	CITIZENS INSURANCE COM	PEND
15	15-0428	GC	P01	SILVER PINE IMAGING LLC//	CITIZENS INSURANCE COM	PEND

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	Case	Type	Pty	Name	Opposing Party	Sts
1	15-0430	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
2	15-0622	GC	P01	SILVER PINE IMAGING LLC//	GEICO INDEMNITY COMPAN	PEND
3	15-0623	GC	P01	SILVER PINE IMAGING LLC//	FARM BUREAU GENERAL IN	PEND
4	15-0636	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
5	15-0637	GC	P01	SILVER PINE IMAGING LLC//	AMERIPRISE INSURANCE C	PEND
6	15-0666	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
7	15-0726	GC	P01	SILVER PINE IMAGING LLC//	WESTFIELD INSURANCE CO	PEND
8	15-0798	GC	P01	SILVER PINE IMAGING LLC//	FARMERS INSURANCE EXCH	PEND
9	15-0903	GC	P01	SILVER PINE IMAGING LLC//	THE HANOVER AMERICAN I	PEND
10	15-0919	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
11	15-0920	GC	P01	SILVER PINE IMAGING LLC//	STATE FARM MUTUAL AUTO	PEND
12	15-0922	GC	P01	SILVER PINE IMAGING LLC//	PROGRESSIVE MARATHON I	PEND
[illegible]						

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APPENDIX E

STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., P.C., INTEGRATED HOSPITAL SPECIALISTS, P.C., INSIGHT ANESTHESIA, P.L.L.C., and STERLING ANESTHESIA, P.L.L.C.,

Plaintiffs-Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court No. 157951

Court of Appeals No. 340370

Genesee County Circuit Court No. 17-108637-NF

/

AFFIDAVIT OF DOREEN E. RAYBA

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

I, DOREEN E. RAYBA, attest under oath to the following:

1. I am employed as a Legal Research Analyst at Hom, Arene, Bachrach, Corbett & Kramer, which is AAA of Michigan's Legal Department.

2. I was asked to quantify the amount of first-party no-fault PIP litigation instituted directly by healthcare providers.

3. To do so, I accessed an in-house report called Legal-Open Provider Case List. The number of total PIP cases is retrieved by accessing the Legal-Total Lit Case Report. Both reports are periodically created and updated in the course of AAA's regularly conducted business activity.

4. The above material discloses that as of November 15, 2018, 1290 of AAA's 2535 open in-house PIP files (51%) are suits filed by healthcare providers.

5. If called as a witness, I could testify to the foregoing from my personal knowledge.

FURTHER AFFIANT SAITH NOT.

Doreen E Rayba

DOREEN E. RAYBA

Subscribed and sworn to before me
this 4th day of December, 2018.

Diane N. Bonham

Notary Public: WAYNE COUNTY

DIANE N. BONHAM
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Aug 9, 2024
ACTING IN COUNTY OF

APPENDIX F

STATE OF MICHIGAN

COURT OF APPEALS

JAWAD A. SHAH, M.D., PC, INTEGRATED HOSPITAL SPECIALISTS, PC, INSIGHT ANESTHESIA, PLLC, and STERLING ANESTHESIA, PLLC,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
May 8, 2018
9:00 a.m.

No. 340370
Genesee Circuit Court
LC No. 17-108637-NF

Before: BORRELLO, P.J., and SHAPIRO and TUKEL, JJ.

BORRELLO, P.J.

In this suit seeking recovery of medical expenses under the no-fault act, MCL 500.3101 *et seq.*, plaintiffs, Jawad A. Shah, M.D., PC, Integrated Hospital Specialists, PC, Insight Anesthesia, PLLC, and Sterling Anesthesia, PLLC, appeal as of right the trial court's order granting summary disposition in favor of defendant, State Farm Mutual Automobile Insurance Company, and denying plaintiffs' motion for leave to amend their complaint as futile. For the reasons set forth in this opinion, we reverse the trial court's order and remand this matter for further proceedings consistent with this opinion.

I. BACKGROUND

This case encompasses various providers of medical and related healthcare services attempting to recover from a no-fault insurer for services rendered to the insured, George Hensley. According to plaintiffs' initial complaint filed on February 24, 2017, Hensley was injured on November 30, 2014, in a motor vehicle accident and was insured by defendant. Plaintiffs submitted claims for services rendered to Hensley, but defendant refused to pay these claims. In their complaint, plaintiffs sought a judgment of approximately $82,000, plus interest and reasonable attorney fees. Defendant answered the complaint and filed its affirmative defenses on April 21, 2017, denying liability.

On May 25, 2017, our Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). In *Covenant*, our Supreme Court held "that healthcare providers do not possess a statutory cause of action against no-fault insurers

for recovery of personal protection insurance benefits under the no-fault act," expressly overruling a body of caselaw from this Court that had concluded to the contrary. *Id.* at 196. In explaining its holding, the *Covenant* Court rejected the notion that a medical provider had independent standing to bring a claim against an insurer to recover no-fault benefits. *Id.* at 195. However, the Court clarified that its decision was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Id.* at 217 n 40.

On July 20, 2017, defendant moved for summary disposition pursuant to MCR 2.116(C)(8). Defendant argued that dismissal was required for failure to state a claim because plaintiff's no-fault claim was "in direct contravention of the Michigan Supreme Court's decision in *Covenant*."

Apparently anticipating defendant's motion, plaintiffs had obtained an assignment of rights from Hensley on July 11, 2017[1] to pursue payment of no-fault benefits for healthcare services "already provided" by plaintiffs.[2] Plaintiffs relied on this assignment to then file a

---

[1] We note that there are four assignments attached to plaintiff's brief in opposition to defendant's motion for summary disposition and that two of those assignments explicitly designate plaintiffs Jawad A. Shah, M.D., PC, and Integrated Hospital Specialists, PC, as assignees. However, the names of the designated assignees in the other two assignments do not match the names of the remaining two plaintiffs. Nonetheless, in the trial court, defendant conceded in its reply brief in support of its summary disposition motion that Hensley had executed an assignment to each plaintiff. Thus, as will be further explained below, it appears that the parties assumed that all plaintiffs received assignments of rights from Hensley and that the parties essentially disputed only (1) whether these assignments were valid in light of the anti-assignment clause in Hensley's insurance policy and (2) whether an amended complaint based on such an assignment would relate back to the date of the original complaint. For purposes of this opinion, we assume without deciding that the assignments effectively assigned the stated rights to plaintiffs in this case as long as such assignments were not barred by the anti-assignment clause. The only issue with respect to the validity of the assignments that was actually raised and decided in the trial court was the effect of the anti-assignment clause. Therefore, we limit our review accordingly to this issue. See *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994).

[2] The assignment of rights forms provided in pertinent part that Hensley was assigning

> all rights, privileges and remedies to payment for health care services, products or accommodations ("Services") provided by Assignee to Assignor to which Assignor is or may be entitled under MCL 500.3101, *et seq*, the No Fault Act. This Assignment is for the right to payment of Assignee's charges, only, and not for the right to payment of any other No Fault insurance benefits.
>
> The Assignment as set forth above is for all services already provided to Assignor by Assignee prior to or at the time of Assignor's execution of this agreement. Specifically, this Assignment **does not** include an Assignment of any future No Fault benefits.

response to the summary disposition motion and a motion for leave to amend the complaint to reflect that the suit was being pursued through the assignment of rights obtained from Hensley. Plaintiffs argued that it was necessary to amend the complaint to allow the action to proceed pursuant to their respective assignments because the *Covenant* decision had extinguished their ability to pursue an independent, direct action against defendant under these circumstances. Again showing foresight in anticipating defendant's next tactical decision, plaintiffs also preemptively argued that if the trial court were to determine that a contractual provision within defendant's policy prevented assignments, then such a provision should not be enforced for one of two reasons. First, plaintiffs argued that defendant would have to show that Hensley was a named insured under the policy (rather than, for example, a passenger entitled to benefits under someone else's policy) for the anti-assignment clause to be enforced against him. Second, plaintiffs argued that the anti-assignment clause was voidable as against public policy where the assignment was obtained after the loss occurred. Furthermore, in an effort to avoid problems with the one-year-back rule of MCL 500.3145(1), plaintiffs also argued that the amended complaint should relate back to the date of the original complaint because the amendment to accommodate the assignments was intended to support the previously filed no-fault claim that arose from the same transaction or occurrence, namely Hensley's injuries sustained in the November 20, 2014 accident. Plaintiffs did not contend that *Covenant* was inapplicable to their suit.

On September 7, 2017, defendant filed a reply in support of its summary disposition motion. As plaintiffs anticipated, defendant argued that an anti-assignment clause in the policy rendered any assignment of rights from Hensley void. Accordingly, defendant argued that plaintiffs' claims should be dismissed because the anti-assignment clause must be enforced as written and was not against public policy. Defendant also argued that the one-year-back rule of MCL 500.3145(1) would bar the assigned claims, or a portion of the assigned claims, even if the assignments were considered valid. Defendant explained that plaintiffs could not obtain any greater rights than those held by Hensley at the time of the assignments. Had Hensley brought suit on the date of the assignments, he could not have obtained damages for any expenses incurred more than a year before that date. Defendant argued that plaintiffs stood in the shoes of Hensley after the assignments and could not obtain any greater rights than this. Defendant also asserted that Hensley had his own lawsuit that had already been resolved and was no longer pending. Defendant further argued that the relation-back doctrine would not apply because the assignment did not exist on the date plaintiffs originally filed their complaint. Defendant contended that plaintiffs were not really seeking an amendment that could relate back to the original complaint pursuant to MCR 2.118(D) but were actually attempting to supplement their complaint pursuant to MCR 2.118(E) in order to allege a subsequently acquired assignment. Defendant explained that supplemental pleadings never relate back to the date of the original pleading. Finally, defendant explained that Hensley was indeed a named insured, and it provided a copy of the declarations page as support.

On the same day, defendant also filed a response to plaintiffs' motion for leave to amend their complaint. Defendant raised the same arguments made in its reply brief and argued that for these reasons, any amendment was futile because the cause of action that plaintiff was attempting to add was legally insufficient on its face.

A hearing on the motions was held on September 11, 2017. The parties' oral arguments reiterated the arguments made in their written submissions. The trial court ruled as follows:

> All right, the Court read both of the motions and the briefs, as well as the second motion, which is the motion for leave to file an amended complaint. As I said they interrelate and the circumstances are that Shah was a provider or plaintiffs were health providers – health services care providers for the insured George Hensley. And apparently only after the covenant [sic, *Covenant* decision] did an assignment take place and the policy language of the State Farm policy, which Mr. Hensley purchased precludes the assignment without approval of State Farm, which did not occur. So actually (inaudible) did not acquire any rights by virtue of the assignment.
>
> And in addition, as pointed out by defense counsel, if it had been granted it would have been a supplemental pleading and the date would be barred under the statute of limitations. You may submit an order if you don't have one here today.

The trial court clarified that it was granting defendant's motion for summary disposition, denying leave to file an amended complaint as futile, and dismissing the case with prejudice. The trial court entered an order[3] granting summary disposition pursuant to MCR 2.116(C)(8) and dismissing the case with prejudice "for the reasons stated on the record."

This appeal followed.

II. ANALYSIS

A. RETROACTIVITY OF *COVENANT* DECISION

Plaintiffs first argue that our Supreme Court's decision in *Covenant* should not apply retroactively but should instead be given prospective effect only.

Whether a judicial decision applies retroactively is a question that this Court reviews de novo. *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 168; ___ NW2d ___ (2017). However, plaintiffs never challenged the retroactive application of *Covenant* or the applicability of *Covenant* to this case in the trial court. In fact, plaintiffs appeared to concede in the trial court that *Covenant* was retroactively applicable and was consequently controlling in this case. Therefore, we must first address whether plaintiffs preserved their argument that *Covenant* should apply prospectively only and not retroactively to the instant case.

"Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (citation omitted). Accordingly, "[f]or an

[3] This order appears to be missing from the lower court file, however a true copy of this order was provided to this Court on appeal.

issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) (quotation marks and citation omitted). The failure to timely raise an issue typically waives appellate review of that issue. *Walters*, 481 Mich at 387. Our Supreme Court has explained the rationale for the preservation requirements as follows:

> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Walters*, 481 Mich at 388 (citations omitted).]

"Although this Court need not review issues raised for the first time on appeal, this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citations omitted). However, while an appellate court has the inherent power to review an unpreserved claim of error, our Supreme Court has emphasized the fundamental principles that "such power of review is to be exercised quite sparingly" and that the inherent power to review unpreserved issues "is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a [criminal] defendant a fair trial." *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987) (quotation marks and citation omitted; alteration in original).

In this case, plaintiffs assert that this issue is preserved for appellate review without identifying a single place in the lower court record where they argued that *Covenant* should not apply retroactively to the instant case. As previously noted, plaintiffs actually treated the *Covenant* decision as the controlling law at all times following the issuance of that decision, arguing that it was necessary to amend the original complaint because the *Covenant* decision had extinguished plaintiffs' independent cause of action against defendant that was not premised on an assignment of rights from Hensley. On appeal, plaintiffs essentially argue they never contested the application of *Covenant* in the trial court, their appellate challenge to the propriety of that retroactive application is somehow automatically preserved because the *Covenant* decision was actually applied retroactively in the trial court and because defendant responded to plaintiffs' arguments on appeal.[4] This argument ignores the fundamentals of appellate

[4] We note that the primary thrust of defendant's appellate argument in response to plaintiffs' retroactivity argument is that plaintiffs failed to preserve this issue for appeal.

preservation law requiring parties to first raise issues in the lower court to be addressed in that forum. *Walters*, 481 Mich at 387; *Mouzon*, 308 Mich App at 419. Therefore, plaintiffs have waived appellate review of this issue. *Walters*, 481 Mich at 387. Plaintiffs may not remain silent in the trial court and then hope to obtain appellate relief on an issue that they did not call to the trial court's attention. *Id.* at 388; see also *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.") (quotation marks and citation omitted).

We further conclude that there is no apparent reason for us to exercise our discretion to review this issue. It does not present a question that must be addressed in order to properly resolve this case and no manifest injustice will result if we decline to review it; as explained below, plaintiffs' legal argument is unavailing because *Covenant* has already been determined to be retroactive in published decisions of this Court. Moreover, a litigant in a civil case must demonstrate more than a potential monetary loss to show a miscarriage of justice or manifest injustice. See *Napier*, 429 Mich at 234. Accordingly, we decline to review plaintiffs' various arguments that *Covenant* is inapplicable to the instant case and should be given prospective application only.[5]

Furthermore, as we alluded to, plaintiffs' argument is without merit even if they had not waived this issue for appellate review. This Court has already held in two recent published decisions that *Covenant* applies retroactively. See *W A Foote*, 321 Mich App at 196; *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 328005); slip op at 4.[6] We are bound by the holdings in *WA Foote* and *VHS Huron Valley*.

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[5] We acknowledge that decisions of our Supreme Court and this Court have applied the plain error standard of review to certain unpreserved issues in the civil context. See, e.g., *Wischmeyer v Schanz*, 449 Mich 469, 483 & n 26; 536 NW2d 760 (1995); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). However, we do not decide today under what circumstances the plain error standard of review should be applied in the civil context. In this case, we simply conclude that there is no need to review plaintiffs' unpreserved issue *at all* because it was waived and no compelling circumstances exist to justify appellate review.

We also recognize the general distinction between forfeiture and waiver, but, as our Supreme Court has explained, the term "waiver" in the civil procedure context "is typically used in the colloquial sense, encompassing inaction that would technically constitute forfeiture." *Walters*, 481 Mich at 384 n 14. That is exactly what happened in this case: plaintiffs failed to raise any argument in the trial court challenging the applicability of the *Covenant* decision to this case, thereby waiving appellate review of any such challenge, and none of the reasons that would justify exercising our discretion to disregard the preservation requirements exist.

[6] We note that this Court declined in both *W A Foote* and *VHS Huron Valley* to decide whether *Covenant* was to be given limited or full retroactive effect because that question was not necessary to the resolution in either of those cases. See *W A Foote*, 321 Mich App at 174 n 9; *VHS Huron Valley*, ___ Mich App at ___; slip op at 4. However, plaintiffs have not provided any discussion or legal analysis addressing whether *Covenant* should receive limited or full retroactive effect in the instant case. Therefore, any such argument is abandoned. See *Wilson v*

See MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis."). And furthermore, whether an application for leave to appeal to our Supreme Court has been filed in a case[7] is irrelevant: "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2).

Therefore, even if this issue had not been waived for our review, *Covenant* is applicable to the instant case, *W A Foote*, 321 Mich App at 196; *VHS Huron Valley*, ___ Mich App at ___; slip op at 4; MCR 7.215(C)(2), and plaintiffs "do not possess a statutory cause of action" against defendant as a no-fault insurer to recover personal protection insurance benefits under the no-fault act, *Covenant*, 500 Mich at 196.

B. ENFORCEABILITY OF CONTRACT PROVISION PROHIBITING ASSIGNMENT

Next, plaintiffs argue that the anti-assignment clause in the insurance policy is unenforceable to prevent the assignment that occurred in this case.

Insurance policies are contracts, and are thus "subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *Id.* at 464. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.* "[U]nambiguous contracts are not open to judicial construction and must be enforced as written." *Id.* at 468 (emphasis omitted). "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties . . . ." *Id.* at 461.

However, our Supreme Court has also recognized that "courts are to enforce the agreement as written *absent some highly unusual circumstance such as a contract in violation of law or public policy*." *Id.* at 469 (quotation marks and citation omitted; emphasis added). "A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions," and "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of the contract provision." *Id.* at 470. With respect to determining

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Taylor, 457 Mich 232, 243; 577 NW2d 100 (1998) ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted); *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

[7] We note that an application for leave to appeal to our Supreme Court has been filed in both *W A Foote* and *VHS Huron Valley*.

whether a contractual provision violates public policy, our Supreme Court explained in *Rory* that "the determination of Michigan's public policy is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." *Id.* at 470-471 (quotation marks and citation omitted). "In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Id.* at 471 (quotation marks and citation omitted).

"Under general contract law, rights can be assigned unless the assignment is clearly restricted." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). Defendant argues in this case that the present matter is one where Hensley's ability to assign his rights is prohibited by a specific contractual provision. The insurance policy states, "No assignment of benefits or other transfer of rights is binding upon *us* [(i.e., defendant)] unless approved by *us*." Despite plaintiffs' newly-raised arguments to the contrary, the language of this provision is perfectly clear.[8] In order for any benefits or rights to be assigned to anyone other than the insured, defendant must consent to the assignment. The assignments at issue attempt to do just that, assigning the right to claim benefits held by Hensley to plaintiffs, and it is undisputed that defendant did not consent to these assignments. The appellate courts of Michigan have previously recognized the enforceability of anti-assignment clauses that are clear and unambiguous. See *Detroit Greyhound Employees Fed Credit Union v Aetna Life Ins Co*, 381 Mich 683, 689-690; 167 NW2d 274 (1969); *Employers Mut Liability Ins Co of Wisconsin v Mich Mut Auto Ins Co*, 101 Mich App 697, 702; 300 NW2d 682 (1980). Thus, because the anti-assignment clause is unambiguous, it must be enforced unless it violates the law or public policy. *Rory*, 473 Mich at 468-469.

Resolution of this issue turns on the application of our Supreme Court's decision in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW2d 303 (1880). In *Roger Williams*, an insurance policy was issued covering livery stable property. *Id.* at 253. The property was destroyed in a fire. *Id.* After the fire, the insured assigned the policy to secure a debt. *Id.* at 253-254. Our Supreme Court refused to enforce an anti-assignment clause in that matter, explaining:

> The assignment having been made after the loss did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this state by statute—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy. [*Id.* at 254.]

Here, the parties provide no authority, and we have found none, explicitly rejecting this analysis in *Roger Williams*. Moreover, it has been deemed controlling on this point of law in at

[8] Plaintiffs did not argue in the trial court that the anti-assignment clause was ambiguous, and this argument is therefore waived for appellate review. *Walters*, 481 Mich at 387.

least two relatively recent[9] opinions of the United States District Court for the Western District of Michigan,[10] *Century Indemnity Co v Aero-Motive Co*, 318 F Supp 2d 530, 539 (WD Mich, 2003) (relying on *Roger Williams* while explaining that under Michigan law, "an anti-assignment clause will not be enforced where a loss occurs before the assignment, because in that situation the assignment of the claim under the policy is viewed no differently than any other assignment of an accrued cause of action."); *Action Auto Stores, Inc v United Capitol Ins Co*, 845 F Supp 417, 422-423 (WD Mich, 1993) (citing *Roger Williams* in support of the proposition that a provision prohibiting assignment without consent of the insurer was invalid with respect to a post-loss assignment).

Our Supreme Court in *Roger Williams* essentially held that an accrued cause of action may be freely assigned after the loss and that an anti-assignment clause is not enforceable to restrict such an assignment because such a clause violates public policy in that situation. *Roger Williams*, 43 Mich at 254. Here, there similarly was an accrued claim against his insurer that was held by Hensley for payment of health care services that had already been provided by plaintiffs before Hensley executed the assignment. Under *Roger Williams*, any contractual prohibition against the assignment of that claim to plaintiffs was unenforceable because it was against public policy. *Id.*

Therefore, we conclude that enforcement of the anti-assignment clause in the instant case is unenforceable to prohibit the assignment that occurred here—an assignment after the loss occurred of an accrued claim to payment—because such a prohibition of assignment violates Michigan public policy that is part of our common law as set forth by our Supreme Court. *Roger Williams*, 43 Mich at 254; *Rory*, 473 Mich at 469-471.

We note that, contrary to the arguments advanced by defendant, the conclusion that a contractual provision is unenforceable due to violating public policy is not equivalent to a judicial assessment of unreasonableness, nor is it in conflict with the principle that unambiguous contracts must be enforced as written. Our Supreme Court has made clear that judicial notions of reasonableness are not proper grounds on which to hold contractual provisions unenforceable. *Rory*, 473 Mich at 470. Our Supreme Court has also made clear that unambiguous contractual provisions are "to be enforced as written *unless the provision would violate law or public policy*." *Id.* (emphasis added). Defendant's arguments appear to incorrectly conflate the concept of "reasonableness" with "public policy." Our decision is not based on any determination that the anti-assignment clause is somehow "unreasonable." Rather, we have simply concluded that enforcing the anti-assignment clause in this circumstance to prohibit an assignment of an accrued claim after the loss has occurred is against Michigan public policy as stated by our Supreme Court one hundred and thirty-eight years ago in *Roger Williams*. Finally, defendant takes issue

[9] While we recognize that cases from 1993 and 2003 are not exactly recent in the ordinary sense, they certainly are recent when compared to a case from 1880.

[10] We recognize that lower federal court decisions are not binding on state courts, but they may be considered persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

with the continued validity of our Supreme Court's holding in *Roger Williams* and its application in the instant case. However, as our Supreme Court has instructed, we are bound to follow its decisions "except where those decisions have *clearly* been overruled or superseded." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016). There is no indication that *Roger Williams* or its holding relating to anti-assignment clauses has been clearly overruled or superseded. Thus, if the continued validity of *Roger Williams* is to be called into question, it will have to be by our Supreme Court.

Plaintiffs also raise several additional grounds for arguing that the anti-assignment clause is unenforceable to prevent the assignment at issue in this case. However, plaintiffs did not raise these additional arguments below and they are thus waived for appellate review. *Walters*, 481 Mich at 387. Nonetheless, based on our conclusion that the anti-assignment clause did not prohibit the assignments at issue in this case, there is no further relief on this issue that we could grant to plaintiffs, and these additional arguments are therefore moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). We decline to address these arguments because we generally do not decide moot issues. *Id.*

C. Effect of the assignments with respect to the one-year-back rule

Next, plaintiffs argue that the trial court should have granted their motion for leave to amend the complaint to account for the assignments and that such an amendment should have related back to the date of the original complaint. In light of our conclusion that the assignments were not prohibited by the anti-assignment clause, the issue to be addressed on appeal becomes determining the effect of the assignments at issue with respect to the one-year-back rule in MCL 500.3145(1). Clearly, we must address this question first before we can address the final, and interrelated, questions of whether the trial court erred by granting defendant's summary disposition motion and denying plaintiffs' motion for leave to amend the complaint.

MCL 500.3145(1) provides in pertinent part that "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." The "one-year-back rule" in MCL 500.3145(1) "is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 203; 815 NW2d 412 (2012).

The instant case presents an unusual situation with respect to the one-year-back rule because plaintiffs began this case on February 24, 2017, as a direct lawsuit filed against defendant insurer under pre-*Covenant* caselaw but sought to amend the complaint to bring the action based on an assignment theory after the *Covenant* decision was issued. Plaintiffs obtained the assignments from Hensley on July 11, 2017. Plaintiffs argue that they may amend their complaint to account for the assignment-of-rights theory and that such an assignment should relate back to the date of the original complaint, which would allow them to pursue benefits incurred during the year preceding the date of February 24, 2017. Defendant, on the other hand, argues that the date of the assignments—July 11, 2017—provides the pertinent reference date for purposes of the one-year-back rule because plaintiffs' motion actually sought leave to file a supplemental pleading rather than an amended pleading.

The rule regarding the relation back of amended pleadings is contained in MCR 2.118(D), which provides in pertinent part that an "amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." However, while an amended pleading may relate back to the date of the original pleading, "there is no provision for relating back as to supplemental pleadings." *Grist v Upjohn Co*, 1 Mich App 72, 84; 134 NW2d 358 (1965).[11] Supplemental pleadings are governed by MCR 2.118(E), which provides in pertinent part as follows:

> On motion of a party the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense.

Further, the "relation-back doctrine does not apply to the addition of new parties." *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) (quotation marks and citation omitted).

In this case, after the *Covenant* decision was issued, plaintiffs sought to amend their complaint to account for the assignments obtained from Hensley and allow plaintiffs to pursue an action against defendant insurer. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt*, 260 Mich App at 653. Thus, plaintiffs could not obtain any greater rights from Hensley on the date of the assignments—July 11, 2017—than Hensley himself possessed on that date. Had Hensley filed an action directly against defendant on July 11, 2017, he would not have been permitted to recover any benefits beyond the portion of the loss incurred one year before that date. MCL 500.3145(1). Accordingly, plaintiffs also could not obtain any right to recover benefits for losses incurred more than one year before July 11, 2017, through an assignment of rights from Hensley. *Burkhardt*, 260 Mich App at 653. Furthermore, the procurement of the assignments was an event that occurred after the filing of the original complaint and provided the only means by which plaintiffs could have standing to maintain a direct action against defendant insurer for recovery of no-fault benefits in this case. *Covenant*, 500 Mich at 195-196, 217 n 40. Therefore, defendant's motion for leave to amend actually sought leave to file a supplemental pleading. MCR 2.118(E). Courts "are not bound by a party's choice of labels because this would effectively elevate form over substance." *Adams v Adams*, 276 Mich App 704, 715; 742 NW2d 399 (2007).

Because plaintiffs actually sought to file a supplemental pleading, it could not relate back to the date of the original pleading. MCR 2.118(D) and (E); *Grist*, 1 Mich App at 84. Through the assignment, plaintiffs only obtained the rights Hensley actually held at the time of the

[11] Although the *Grist* Court was discussing GCR 1963, 118.5, this former court rule was substantively the same as the current court rule addressing supplemental pleadings, which is MCR 2.118(E).

execution of the assignment, *Burkhardt*, 260 Mich App at 653, and plaintiffs cannot rely on the relation-back doctrine to essentially gain the potential for a greater right to recovery than they actually received. As our Supreme Court explained in *Jones v Chambers*, 353 Mich 674, 681-682; 91 NW2d 889 (1958):[12]

> The assignment created nothing. It simply passed to plaintiffs' insurer rights already in existence, if any. If plaintiffs' insured had no rights, then plaintiffs' insurer acquired none by virtue of the assignment. To rule otherwise would be to give such an assignment some strange alchemistic power to transform a dross and worthless cause of action into the pure gold from which a judgment might be wrought. [Quotation marks omitted.]

Therefore, through the assignments in this case, plaintiffs did not obtain the right to pursue no-fault benefits for any portion of the loss incurred more than one year before July 11, 2017, because that is the pertinent point of reference for purposes of the one-year-back rule. A supplemental pleading predicated on the July 11, 2017 assignments could not relate back to the date of the original pleading.

D. APPLICATION

We now turn to the trial court's final ruling granting summary disposition in favor of defendant and denying plaintiffs' motion for leave to amend.

"This Court reviews de novo the trial court's decision to grant or deny summary disposition." *Rory*, 473 Mich at 464. The trial court granted summary disposition pursuant to MCR 2.116(C)(8).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (citations omitted).]

However, we note that the trial court clearly considered material outside the pleadings, contrary to the proper procedure for considering a motion under MCR 2.116(C)(8). The insurance policy that contained the anti-assignment clause was crucial to the trial court's decision that plaintiffs could not maintain any claim against defendant predicated on assignments from Hensley; this insurance policy was attached to defendant's reply brief in support of its

[12] Although the language from *Jones* that we have quoted was a quotation attributed to the circuit court judge in that case, our Supreme Court explicitly adopted this reasoning. *Jones*, 353 Mich at 682.

motion for summary disposition and defendant's response to plaintiffs' motion for leave to amend the complaint. Furthermore, the assignments on which plaintiffs relied were attached to plaintiffs' brief in opposition to the motion for summary disposition, as well as plaintiffs' brief in support of their motion for leave to amend the complaint. While a written instrument that forms the basis for a claim or defense and that is attached to or referred to in a pleading may be treated as "part of the pleading for all purposes," MCR 2.113(F), neither the assignments nor the insurance policy were attached to or referred to in a *pleading*, MCR 2.110(A) (defining the term "pleading" to include only a complaint, cross-claim, counterclaim, third-party complaint, an answer to any of the aforementioned pleadings, or a reply to an answer).

Thus, we treat the motion as having been brought and decided under MCR 2.116(C)(10) because it necessarily involved considering material outside the pleadings.[13] Cf. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007) ("[W]here, as here, the trial court considered material outside the pleadings, this Court will construe the motion as having been granted pursuant to MCR 2.116(C)(10).").

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120 (citations omitted).]

"The grant or denial of leave to amend pleadings is within the trial court's discretion." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). A trial court's decision on whether to permit a party to serve a supplemental pleading is also discretionary. See MCR 2.118(E) (providing in pertinent part that the court "may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading"); *In re Estate of Weber*, 257 Mich App 558, 562; 669 NW2d 288 (2003) ("[T]he term 'may' presupposes discretion and does not mandate an action."). "[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *PT Today, Inc*, 270 Mich App at 143. "The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile." *Id.* "[A]mendment is generally a matter of right rather than grace." *Id.*

"This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of that discretion that resulted in injustice." *Id.* at 142. "[A]n abuse of

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[13] Moreover, neither party has argued in the trial court or on appeal that the trial court erroneously considered material outside the pleadings in treating the summary disposition as a motion under MCR 2.116(C)(8). Therefore, any potential appellate challenge on this ground is abandoned. *Houghton*, 256 Mich App at 339-340.

discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016); see also *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009) ("A court by definition abuses its discretion when it makes an error of law.") (quotation marks and citation omitted).

In this case, the trial court granted defendant's motion for summary disposition and denied plaintiffs' motion for leave to amend their complaint because the trial court concluded that the anti-assignment clause prohibited any assignment from Hensley and that any claims based on such an assignment would be time barred nonetheless.

"If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Yudashkin v Linzmeyer*, 247 Mich App 642, 651; 637 NW2d 257 (2001) (quotation marks and citation omitted); see also MCR 2.116(I)(5) ("If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Yudashkin*, 247 Mich App at 651 (quotation marks and citation omitted). Under MCR 2.118(A)(2), a party may amend a pleading by leave of the court and such "[l]eave shall be freely given when justice so requires."

Here, as previously discussed, the anti-assignment clause was unenforceable to the extent that it prohibited the particular assignments at issue, and the one-year-back rule did not bar *all* of plaintiffs' claims but only those that were based on services provided more than one year before the date of the assignment. Accordingly, the trial court's decision was based on a misapplication of the law, and the trial court necessarily abused its discretion in denying plaintiffs the opportunity to serve its supplemental pleading. *Ronnisch*, 499 Mich at 552. Similarly, because the anti-assignment clause was not enforceable and the one-year-back rule did not bar all of plaintiffs' claims, the trial court erred by granting defendant's motion for summary disposition without properly applying the law in determining whether an amendment to the pleadings would be futile. *Rory*, 473 Mich at 464; *Yudashkin*, 247 Mich App at 651.

Defendant's remaining argument related to the jurisdictional minimum for the amount in controversy constitutes an argument that an alternate ground for affirming the trial court's ruling exists. This argument was not presented to the trial court. As an error-correcting court, *W A Foote*, 321 Mich App at 181, this Court's review is generally limited to matters actually decided by the lower court, *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994). We acknowledge that this Court may affirm the grant of summary disposition on an alternate ground that was not decided by the trial court when the issue was presented to the trial court. *Adell Broad v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2005). However, it is apparent that the trial court's ruling in the instant case was based on an erroneous application of the pertinent legal principles since the trial court determined that the anti-assignment clause was enforceable in this case, contrary to Michigan public policy, and that the one-year-back rule would bar *all* of plaintiffs' claims even if the assignments had been treated as valid. Thus, we

conclude that it would be better for any additional matters relating to plaintiffs' proposed supplemental complaint to be addressed in the first instance by the trial court under the proper legal framework.

We reverse the order of the trial court and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Jonathan Tukel

STATE OF MICHIGAN

COURT OF APPEALS

JAWAD A. SHAH, M.D., PC, INTEGRATED HOSPITAL SPECIALISTS, PC, INSIGHT ANESTHESIA, PLLC, and STERLING ANESTHESIA, PLLC,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
May 8, 2018

No. 340370
Genesee Circuit Court
LC No. 17-108637-NF

Before: BORRELLO, P.J., and SHAPIRO and TUKEL, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the anti-assignment clause in defendant's policy is unenforceable because it conflicts with long-standing principles of contract law and the Michigan no-fault act. I dissent from the majority's conclusion that the one-year-back provision runs from the date of the assignment rather than from the date set forth in the no-fault act, i.e. the date "the action was commenced." Lastly, I conclude that *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), lv pending, was wrongly decided, and that *Covenant Medical Ctr, Inc v State Farm Auto Mut Ins* Co, 500 Mich 191; 895 NW2d 490 (2017), should be given only prospective application.

I. ANTI-ASSIGNMENT CLAUSE

For over 100 years, Michigan law has provided that all contracts, other than those that involve personal performance, are assignable. In *Northwestern Cooperage & Lumber Co v Byers*, 133 Mich 534; 95 NW 529 (1903), the Michigan Supreme Court held that:

> [W]here an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and when the latter has not disqualified himself for a performance of the contract, it is assignable.

Accord *Voigt v Murphy Heating Co*, 164 Mich 539; 129 NW 701 (1911); *Detroit, T. & I.R. Co v W.U. Tel Co*, 200 Mich 2, 5; 166 NW 494 (1918).

This basic principle of contract law has never changed. It was recently articulated *In re Jackson*, 311 BR 195, 200-201 (Bankr WD Mich, 2004), where, applying Michigan law, the court stated:

> As a general rule, contract rights and duties are assignable.
>
> Notwithstanding this general rule, Michigan law recognizes certain classes of contracts as inherently nonassignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications. [Citations omitted.]

In this case, it is undisputed that the contract in question is not one for personal services, and so falls within the general rule that contract rights may be assigned.

Defendant argues that despite this general rule, the insured may not assign his right to overdue benefits because its insurance policy contains an anti-assignment clause. The majority properly relies on *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), for the principle that once the assigning party has performed, her right to assign past benefits cannot be contractually limited. Significantly, *Roger Williams* does not stand alone and multiple legal authorities support its analysis.

The case of *In re Jackson,* cited above, is directly on point. The contract in that case was a settlement agreement that provided for Jackson to receive annuity payments. *In re* Jackson, 311 B R at 197. The settlement contract contained an anti-assignment clause, and the question before the court was whether the annuity payments could nevertheless be assigned. The court answered affirmatively, noting that while a party may not assign benefits while its own performance is incomplete, it cannot be barred from assigning its rights as to the other party's performance once it has itself performed:

> An executory contract is "a contract that remains wholly unperformed *or for which there remains something still to be done on both sides.*" With respect to the [Jackson's] contractual obligations, the Settlement Agreement is not executory. Immediately upon executing the Settlement Agreement, [Jackson] released her claims against the state court defendants and dismissed her lawsuit with prejudice. As of the date of the [Jackson's] agreement with Settlement Capital, Jackson had fully performed the duties required of her.
>
> Therefore, Jackson, *having held up her end of the bargain with Transamerica Insurance, had every right to partially assign her interest in the annuity to Settlement Capital, irrespective of the anti-assignment clause.* The modern trend with respect to contractual prohibitions on assignments is to interpret them narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to assignee. Unless the circumstances indicate the contrary, a contract term prohibiting

assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition.

* * *

[It is argued] that the anti-assignment clause in the Settlement Agreement renders inapplicable the general rule that contract rights and duties are assignable. We find however, that Michigan law mandates application of the general rule. This finding is based on the theory that *once a party to a contract performs its obligations to the point that the contract is no longer executory, its right to enforce the other party's liability under the contract may be assigned without the other party's consent, even if the contract contains a non-assignment clause.* [*In re Jackson*, 311 BR at 201 (quotation marks and citations omitted) (emphasis added).]

This principle is broadly recognized. As described in Couch on Insurance:

[T]he great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss,[2] for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.[3] *The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.* [3 Couch on Insurance, § 35:8 (emphasis added)].

Another learned treatise states:

Anti-assignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involves a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however, as a general principle, *a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy – consisting of the right to receive the proceeds of the policy – after a loss has occurred.* The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property. [17 Richard A. Lord, *A Treatises on the Law of Contract by Samuel Williston*, § 49:119 (4th ed, 2015) (emphasis added).]

The Restatement of Contracts 2d, § 322(1), articulates the same rule, stating, "Unless the circumstances indicate the contrary, a contract term prohibiting assignment of 'the contract bars only the delegation to an assignee of the performance by the assignor of a duty or condition." This principle is more clearly expressed in The Restatement of Contracts 2d, § 322(2), which provides that "[a] contract term prohibiting assignment of rights under the contract . . . does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation."

Defendant State Farm makes a public policy argument, asserting that permitting assignments will significantly complicate the claims process. This argument is both factually and legally inapposite. It is *factually* inapposite for two reasons. First, because defendant already has a claim process that has been operational for decades that allow for assignments and payment to providers. Second, because defendant's claims of increased administrative costs is not supported by any *evidence.* It should come as no surprise that a court may not base its decision on factual assertions unsupported by any evidence; such factual assertions amount to nothing more than speculation until such evidence is proffered. State Farm's public policy argument is *legally* inapposite for two reasons. First, because it is inconsistent with over 100 years of law. Second, because its position is intrinsically contrary to the purpose of the no-fault system, which is designed to provide "*assured*, adequate, and prompt reparation for certain economic losses." *Shavers v Kelley*, 402 Mich 554, 579; 267 NW2d 72 (1978) (emphasis added). Defendant takes the position that it has an unrestricted right to employ mechanisms to decrease its *administrative costs* even where those administrative mechanisms will result in a denial of benefits to injured persons who have paid their premiums and obtained reasonable and necessary medical treatment following a covered accident.

This view is contrary to Michigan law generally, and to the no-fault act in particular. As the court explained in *Wonsey v Life Ins Co of North America*, 32 F Supp 2d 939, 943 (ED Mich, 1998):

> [D]efendants strenuously argue that when a beneficiary of a structured settlement agreement decides to sell all or a number of his future payments, "it requires a complicated review process" and that "defendants [would be required] to review substantial paper work, and [to] determine if the assignment appears to be legal . . . and/or whether any guarantees or releases provided by the assignor . . . are satisfactory to fully and completely protect [defendants]. . . ." The Court is not persuaded. *The reasons asserted by defendants in objecting to the proposed assignment do not appear to amount to substantial harm or actual prejudice to defendants' interests, but merely center upon the necessary administrative tasks associated with the assignment's implementation.* As such, defendants have not submitted sufficient reasons to . . . [enforce] contractual anti-assignment clauses. (Emphasis added).

The no-fault act itself speaks to the issue of assignment. It provides, "An agreement for assignment of a right to benefits *payable in the future* is void." MCL 500.3143 (emphasis added). Notably, the Legislature elected not to void assignment of past due benefits. By not including past due benefits in this statutory prohibition, the Legislature, under the doctrine of

expressio unius est exclusion alterius, made clear its intent to adhere to the fundamental principle that assignments of past due benefits are effective and proper.

Defendant argues that its "right of contract" must supersede these long-standing principles. However, it cites nothing in the no-fault act providing that insurers may add *policy language* ostensibly in order to limit administrative costs that have the effect of denying benefits to individuals who are entitled to them under the *statutory language*. Defendant cites to *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), for the principle that an insurance contract may include provisions as to which the no-fault act does not speak. However, defendant reads *Rory* too generously. *Rory* involved uninsured motorist coverage, an insurance product whose mechanism is not governed by the no-fault act.[1]

Defendant's theory seems to be that it may include any provision to its policies so long as the provision is not explicitly barred in the no-fault act. It contends therefore, that it has the right to add policy provisions not provided for in the Act whose result, if not purpose, is to deny benefits to people who qualify under the statute. This position cannot be squared with the fundamental goal of the no-fault act to provide "*assured*, adequate, and prompt reparation for certain economic losses." *Kelley*, 402 Mich at 579.

Defendant's conceptual error lies in its view that the no-fault act is defined by what *it does not say*, i.e. because the Act does not explicitly prohibit an anti-assignment provision, an insurer is free to insert such a provision into the policy regardless of its effect on the functioning of the no-fault system and an insured's ability to obtain covered medical treatment. However, the no-fault act must be defined by what it *does say*. It defines a comprehensive statewide *system* designed to provide "assured, prompt and adequate" coverage for medical services following an auto accident. The fact that the Act does not contain an omnibus list of actions inconsistent with that comprehensive system does not mean that it intended that such actions

[1] I respectfully suggest that the Michigan Supreme Court should revisit *Rory*'s conclusion that there is no such thing as a "contract of adhesion." Anyone (except perhaps some lawyers and judges) who has ever purchased an auto insurance policy—which under law all car owners must do—knows exactly what a contract of adhesion is. One party, typically an individual, is presented with a pre-printed policy and told to "take it or leave it." On the other side is typically an insurance entity with billions of dollars in assets and multiple employees dedicated to drafting contract language that will favor the entity in every way possible under the law or in what the entity hopes it can reshape the law to be. If the individual, assuming he or she is able to understand the policy language, declines to accept every word as written, they will not be permitted to purchase a policy. No revisions are even entertained. Moreover, if this individual then seeks coverage from a competitor insurer, they are all but certain to face the same or similar situation. In sum, the only "freedom of contract" that an individual purchaser has is to buy or not buy. And that freedom is illusory since by law, every vehicle owner must obtain insurance. Accordingly, I respectfully suggest that the "freedom of contract" discussed in *Rory* is less a reality in this context than it is a phrase used to permit the judicial branch to ignore the words and the will of the Legislature as defined in the no-fault act.

should be permitted. There is nothing in the Act that indicates that the Legislature intended to allow insurers to unilaterally add limitations on benefits. Ultimately, if insurers are free to add whatever administrative conditions or hurdles their policy drafters can define, then the Legislature's comprehensive system will be sliced and diced by artfully drafted policy provisions, and deprive insureds the benefits they paid for, and which the no-fault act mandates. Defendant's position is a slippery slope by which the no-fault system dies the death of a thousand cuts.

II. ONE-YEAR-BACK RULE

I dissent from the majority's conclusion that the one-year-back date should be measured from the date of the assignment and not the day that suit was filed. The statute provides that benefits may not be recovered "for any portion of the loss incurred more than 1 year before *the date on which the action was commenced.*" MCL 500.3145(1) (emphasis added). In this case, the action was commenced on February 24, 2017, by these plaintiffs against this defendant. Nothing has changed in the nature of the action. I respectfully suggest that the majority is mistaken in its view that the addition of an allegation to establish standing when the issue is raised "commences" a new "action."

The majority cites scant authority for this position. It cites *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004), for the general principle that an assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses."[2] From this, the majority concludes that "plaintiffs could not obtain any greater rights from Hensley on the date of the assignments—July 11, 2017—than Hensley possessed on that date." However, the triggering of the one-year-back statute does not depend on whether there was a "right" to file suit, but only on the date suit was filed. Of course, if a party lacks the "right" to

[2] *Burkhardt* was not a no-fault case and the question was whether a party could assign rights it did not possess at the time of the assignment. In the instant case, by contrast, there is no dispute about the insured's possession of the right to benefits when he assigned them to the plaintiff health care provider. Specifically, *Burkhardt* involved multiple parties involved in a tax foreclosure and subsequent assignments. The party foreclosed upon, Bailey, did not redeem and the plaintiff purchased the property at tax auction. 260 Mich App at 639-640. The plaintiff, however, failed to give notice to the mortgagor, Bond. *Id.* at 640. The case came before this Court twice. In its first decision, the Court refused to quiet title and held that Bailey had lost all rights of redemption, but that Burkhardt still had time to provide notice to the mortgagee who could thereupon, object and assert its rights, which it later did. *Id.* at 641. While the case was pending on appeal, the intervening defendant, Hamilton, provided funds to Bailey to pay off his mortgage and Bond recorded a discharge of the mortgage. *Id.* at 641-642. After the discharge of the mortgage, Bond assigned any rights of redemption it had to Hamilton who sought to redeem. The Court determined that once the mortgage was discharged, Bond's rights as mortgagor were extinguished, and so Bond had no right of redemption to assign to Hamilton. *Id.* at 645-646. Accordingly, the Court found that Bond's assignment to Hamilton was void and granted Burkhardt a quiet title judgment. *Id.* at 660-661.

sue, then the court in which it was filed will dismiss it and in those cases, the application of the one-year-back rule will not be at issue. However, here, plaintiffs sought to amend his complaint to cure the standing problem *before* the court ordered that it be dismissed, and as already noted, neither the parties nor the cause of action changed in any way.

The majority also relies on *Grist v Upjohn Company*, 1 Mich App 72; 134 NW2d 358 (1965), but the question in that case was fundamentally different than the one before us today. In *Grist*, the plaintiff sued for defamation. *Id.* at 74. Later, she sought to add an additional count of other acts of defamation that had occurred since the filing of her complaint. *Id.* at 76-77. However, the statute of limitations had run as to these new claims, so she asserted that she could add them to her original complaint by the doctrine of relation back. *Grist*, 1 Mich at 83-84. The Court rejected the argument stating that the plaintiff may not add new *claims* as to which the statute had run by adding them to a previously filed action. *Id.* at 84-85. In the instant case, plaintiffs do not seek to add any claim and certainly does not seek to add a claim as to which the statute of limitations has run. Indeed, every claim at issue in this case was defined and set forth in the initial complaint. Plaintiffs seek exactly what it sought at the outset of the case, payment of past due benefits.

Accordingly, I would hold that the one-year-back period runs from the date the suit was filed.

III. RETROACTIVITY OF *COVENANT*

In *Covenant*, 500 Mich at 195, the Michigan Supreme Court held that healthcare providers do not have an independent cause of action against a no-fault carrier for failure to pay benefits. In *W A Foote Mem Hosp*, 321 Mich App at 196, this Court concluded that the rule articulated in *Covenant* should be applied retroactively. I agree with much of the Court's analysis in that case. The opinion accurately reviews the United States Supreme Court's decision in *Harper v Virginia*, 509 U S 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993), which holds that retroactive application must be applied in federal cases, but notes that the individual states are not bound to follow that rule. I am less convinced by the *Foote* Court's reliance on *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012), which continued to recognize that an exception to the principle of retroactivity, stating:

> When a statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision.

The Court went on to note that in the case before it, the "decision today does not at all affect the parties' contractual rights" and should be retrospectively applied. *Id.* at 536-537.

There is no question that plaintiffs: (1) properly and reasonably relied on what appeared to be settled law when it filed suit, (2) that it provided services to defendant's insured based upon that law, and (3) that it has not been paid. A prospective application would merely allow health care providers that provided services based on the law as it was universally understood, to be

paid for those already-provided services. A retroactive application, by contrast, creates a distorted result inconsistent with the no-fault act. The hospital, which provided a valuable service, will remain unpaid, while the insurer, which has already been paid (the insured's premiums), will not have to provide the service it was paid to perform.

With these concerns in mind, I respectfully suggest that the better course would be to follow the common-sense principles described in *Tebo v Havlik*, 418 Mich 350; 343 NW2d 181 (1984), which arose prior to the Supreme Court's decision in *Putney v Haskins*, 414 Mich 181; 324 NW2d 729 (1982), that required that dramshop plaintiffs "name and retain" the intoxicated driver as a defendant when suing the bar or other liquor license. MCL 436.22. Thus, the statute was adopted while the case was pending. The question therefore, was whether the "name and retain" requirement should be applied retroactively, which would result in the dismissal of many dramshop cases filed before the change:

> It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result.
>
> The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law. *Placek v. City of Sterling Heights,* 405 Mich. 638, 665, 275 N.W.2d 511 (1979).
>
> Appreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law. Thus, when the doctrine of imputed negligence was overruled in *Bricker v. Green,* 313 Mich 218; 21 NW2d 105 (1946), the decision was applied only to the case before the Court and to pending and future cases. When the doctrine of charitable immunity was overruled in *Parker v. Port Huron Hospital,* 361 Mich 1; 105 NW2d 1 (1960), the retroactive effect of the decision was limited to the parties before the Court. Even where statutory construction has been involved, this Court has limited the retroactivity of a decision when justice so required.
>
> The question before us is whether our interpretation of a statute should be applied retroactively to the statute's effective date. In *Putney,* we found the clear import of the statute to be to require the plaintiff to name and retain the allegedly intoxicated person at risk. Were *Putney* a case of first impression in the Michigan courts, we would hold that the statutory language gave plaintiffs no reason to believe that the settlements entered into would comply with the "retain" portion of the statute. *Putney,* however, was not a case of first impression in the Michigan courts.

* * *

> In light of the unquestioned status of *Buxton* at the time *Putney* was decided by this Court, it would be unjust to apply *Putney* retroactively to persons other than those before the Court in that case.
>
> In contrast to the harsh effect which the full retroactivity of *Putney* would have on injured plaintiffs, prospective application will have little effect on dramshop defendants in those pending cases where settlement agreements have been made, even though the defense of *Putney* will be unavailable. For them, the law will simply remain as it was from 1976 to 1982. We hold that *Putney v Haskins* is applicable to all cases where settlement agreements are entered into with the allegedly intoxicated person after the date of decision in *Putney*. [*Tebo*, 418 Mich at 360-361, 363-364 (quotation marks and citation omitted.)]

For these reasons, I conclude that *Foote* was wrongly decided and that *Covenant* should only be applied prospectively.

III. CONCLUSION

I join the majority in holding that the anti-assignment clause in the policy is unenforceable. I dissent from the majority's conclusion as to the one-year-back rule, which I conclude should be calculated from the date plaintiffs filed suit.

/s/ Douglas B. Shapiro

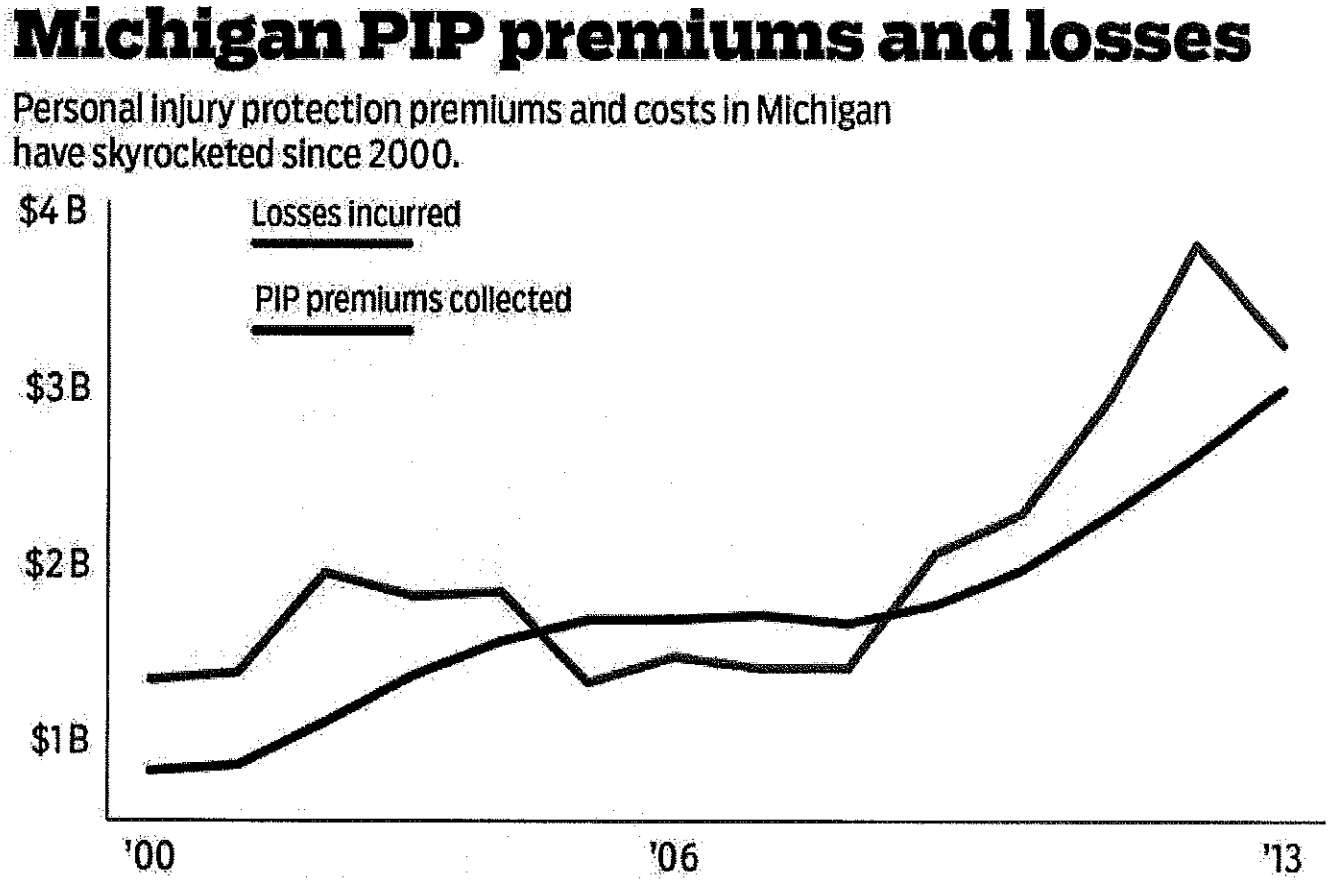
APPENDIX G

CRAIN'S DETROIT BUSINESS

October 22, 2017 12:15 AM

How Michigan's auto insurance premiums became the highest in the country

CHAD LIVENGOOD



SOURCE: National Association of Insurance Commissioners

Medical bills for injured Michigan motorists have tripled since 2000 as personal injury protection coverage went from one-fifth of all premium dollars collected from vehicle owners to more than half by 2013.

- Michigan's cost per auto accident injury tripled between 2000 and 2013 to $75,600
- Medical costs in auto insurance outpaced normal health care inflation by 90 percent
- Industry reported average 2.9 percent loss on auto insurance between 2005 and 2014

Medical bills for injured Michigan motorists have tripled since 2000 to levels that far outpace normal health care inflation and the average treatment costs in larger states.

Personal injury protection coverage now accounts for the majority of auto insurance premiums. Repairing people now costs far more than repairing cars.

And despite premiums that are the highest in the country, auto insurers aren't even making money on auto insurance.

A *Crain's* analysis of industry data shows total premium dollars collected by insurers for personal injury protection (PIP) soared by 278 percent in Michigan between 2000 and 2013, while medical costs rose by 145 percent to $3.2 billion, even though the number of motorists injured annually declined by 20 percent.

The self-reported data from insurance carriers reveals a major shift in the leading cause of the ever-rising cost of auto insurance in Michigan: Premiums that were once dominated by the cost of repairing vehicles are now swamped by the growing cost of treating injured drivers and passengers.

AUTO INSURANCE PRIMER

- Auto insurance premiums for motorists in Michigan vary wildly depending on a host of rating factors and discounts.
- Car owners get discounts and additional charges based on their ZIP code, driving history, distance of daily commute, gender, age, education level, credit score and other non-driving factors.
- When it comes to personal injury protection, which is legally required for all drivers, their ZIP code can be the most consequential factor in auto insurance in urban and densely populated suburban areas of Michigan.
- Insurance companies use their claims data from prior years based on collision property damage and personal injuries to set rates for those portions of a driver's premium.
-

But there's no consistency in what rating factors insurance carriers use. For example, some use education level or job title, and others don't.

- Auto insurers are required to show the Michigan Department of Insurance and Financial Services only that the pricing behind the rating factors is actuarially justified.

Personal injury protection coverage — which motorists are legally required to purchase — went from one-fifth of all premium dollars collected from vehicle owners in 2000 to more than half by 2013. Collision coverage for fixing damaged cars and trucks declined overall by nearly 6 percent over a 14-year period in industry premiums data analyzed by *Crain's*.

Reducing the medical costs in Michigan's unique and limitless insurance for injured motorists to give drivers premium relief is at the heart of competing legislative proposals that Michigan lawmakers could take action on in the coming weeks.

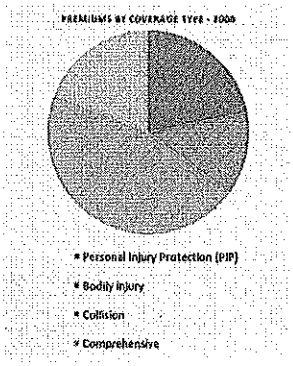
As lawmakers and special interest groups wrangle over reform, recent state filings from several of Michigan's largest carriers show that the cost of personal injury protection continues to rapidly rise and often faster than any other category of car insurance, a *Bridge Magazine* review of insurance premiums showed. (This story is part of a cooperative project by *Crain's* and *Bridge*.)

Between 2013 and October of this year, AAA of Michigan's base rates for personal injury protection jumped nearly 80 percent and now comprise more than 95 percent of the base rates for mandatory coverages and 88 percent of all coverages, including collision and comprehensive.

For Home-Owners Insurance Co., personal injury protection rates jumped 46 percent from 2013 to 2017 and comprise 88 percent of the mandatory coverage base rate.

"The crisis is undeniable," said Mark Bernstein, a Farmington Hills personal injury attorney who favors Detroit Mayor Mike Duggan's plan to drastically reduce medical costs. "Nobody can say with a straight face that there isn't a problem that needs to be addressed."

> But a political stalemate has hung over the Capitol for years as a term-limited Legislature that loses dozens of members every two to four years has been unable to find a compromise that ensures



PIP costs grow: The share of auto insurance premiums accounted for by each type of coverage. Personal injury protection has jumped from 22 percent of the total premium to 52 percent over the years.

lower insurance rates without gutting what's regarded as the best medical coverage for auto accidents in America.

"The trouble is, nobody appears to be willing to really put drivers first — because they're all just making way too much money," said Bernstein, whose family law firm represents injured motorists in so-called third-party "pain and suffering" lawsuits against at-fault drivers.

With no statutory limits on how much money Michigan hospitals and doctors can charge in a system that's beset by **nearly constant litigation**, the average cost per auto accident injury claim topped $75,600 in 2013. That's more than five times the next highest state, New Jersey, which recorded a $13,630 average in medical costs for each injured motorist.

"I don't know of anything that has a claim severity that remotely approaches $75,000 per claim," said Jim Lynch, chief actuary at the Insurance Information Institute, a Washington, D.C.-based industry group. "I think that's up there with flood insurance."

Larger no-fault states like New York and Florida, which have set prices for medical care for injured drivers and caps on total costs, had average medical expenses in 2013 of $7,876 and $7,002, respectively, according to the most recent data available from the National Association of Insurance Commissioners.

New York's medical cost per driver decreased by nearly 3 percent from 2000 to 2013, while New Jersey had a 12 percent increase and Florida's costs rose by about 9 percent.

Michigan's average cost per motorist soared by 210 percent during those 14 years, according to industry data.

The tripling of costs per injured driver and passenger between 2000 and 2013 outpaced medical inflation for that period by nearly 90 percent, a *Crain's* analysis show.

"Medical costs are going up anyway, but when you have a blank check it is not surprising that people are taking advantage of that," said state Rep. Lana Theis, chair of the House Insurance Committee.

Legislative impasse

Michigan's highest-in-the-nation auto insurance rates have spawned a perpetual state of lobbying war in Lansing between insurers who want to lower their liabilities and become consistently profitable and the hospitals, medical clinics, lawyers and injured drivers entangled in a no-fault auto insurance industrial complex they're fighting to preserve.

"It depends on who you're sleeping with," said Jerry Acker, a personal injury attorney and managing partner of Goodman Acker, P.C. in Southfield. "The hospitals want the money. The insurance companies want the money."

Theis, R-Brighton Township, is sponsoring legislation backed by Duggan and House Speaker Tom Leonard that would greatly curtail medical spending in auto insurance by allowing drivers to opt out of unlimited lifetime personal injury benefits in exchange for a lower-cost plan.

The reform plan in House Bill 5013 would allow drivers to opt out of unlimited medical coverage for two coverage tiers of $250,000 and $500,000 that would no longer give them access to Michigan's catastrophic injuries fund that currently covers medical bills exceeding $550,000.

The $250,000 plan has been widely criticized because just $25,000 could be used for post-hospitalization care, such as out-patient surgery, rehabilitation or reimbursement for lost wages.

To make medical care dollars go further, the Republican legislative leaders and Detroit's Democratic mayor want to impose Medicare-level payment rates that could cut medical payments in the auto insurance system for some procedures by as much as two-thirds.

DETROIT ISN'T THE ONLY CITY WITH OUTSIZED INSURANCE RATES

The high rates in Detroit are creeping into the suburbs and beyond, and with them huge disparities between bills in one city versus another. **Read story.**

A bipartisan **coalition of legislators** allied with the hospitals, trial attorneys and the most catastrophically injured drivers have proposed less drastic cost-controls.

Lawmakers remain deeply divided over paring back what's considered the best medical care in America that money can buy for injured drivers and passengers while the insurance industry continues to set individual rates based on where a motorist lives, their **education level**, credit score, marital status and other factors that have nothing to do with driving.

"The right approach is to contain costs and ensure rate relief to Michigan drivers without cutting the benefits people need when they're in catastrophic car accidents," said Rep. Tim Greimel, an Auburn Hills Democrat opposed to Duggan's plan.

The insurance claims data analyzed by *Crain's* includes the premiums collected and losses incurred by the by the Michigan Catastrophic Claims Association, which assesses all insured vehicles a $170 annual fee to cover long-term care costs exceeding $550,000.

Critics of the Duggan-Leonard-Theis plan contend that offering drivers the $250,000 coverage option will put financial strain on the catastrophic claims system as they flock to insurance plans with lower prices.

"It's going to increase costs there potentially because you'll have less people paying in," said state Rep. Michael Webber, R-Rochester Hills.

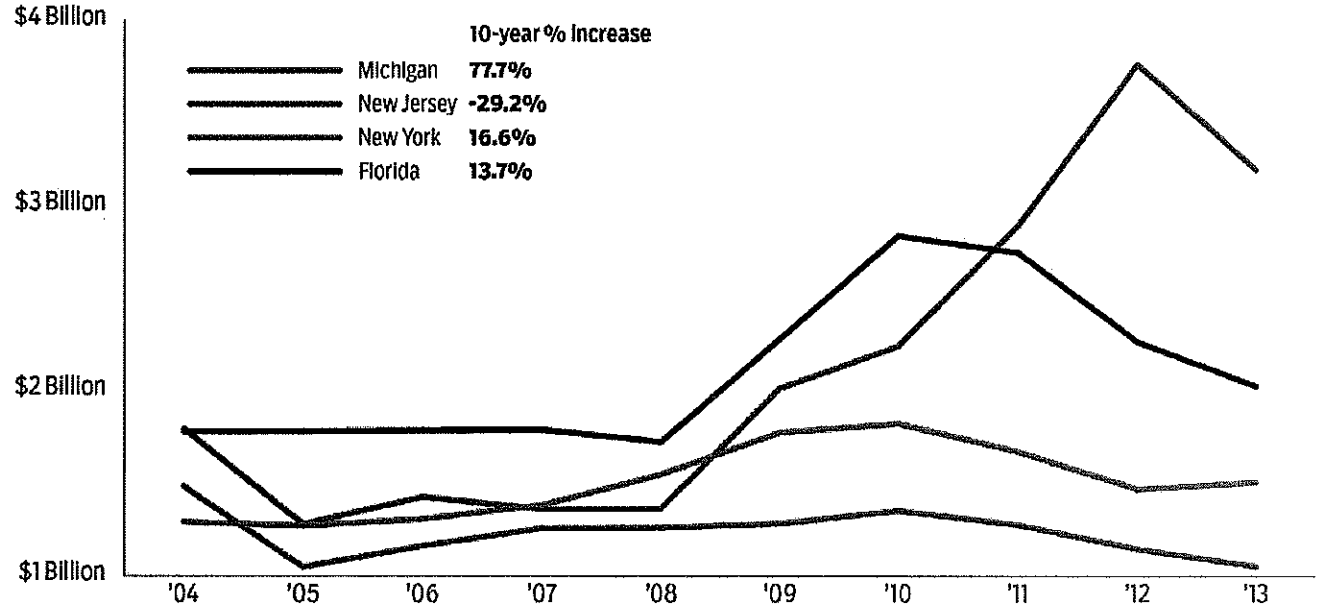
Complicating efforts to find compromise in Lansing are divisions among the different businesses involved over putting into state law set payment rates for medical providers and mandated double-digit rollbacks in the premiums insurers can charge in a competitive market.

The Michigan Health & Hospital Association has offered in the past to voluntarily freeze its charges for a set period of years, but has steadfastly resisted a government-mandated fee schedule.

"For the providers, that's like us coming out with a proposal that says auto insurers can't use ZIP codes to set their rates," said Chris Mitchell, senior vice president of advocacy for the hospital association. "It's what I would consider a poison pill."

Michigan's costs dwarf others

Michigan's total spending on care for injured drivers dwarfs that of New Jersey, a no-fault state that has about the same number of licensed drivers, and even New York and Florida, which have far more.



SOURCE: National Association of Insurance Commissioners annual auto insurance database reports

Escalating losses, lawsuits

For this report, *Crain's* studied 14 years of auto insurance industry data and found a dramatic increase in medical expenses, even as the number of drivers and passengers injured decreased by about 10,000 annually between 2000 and 2013.

Auto insurers are required to file their geography-based insurance rates with the state Department of Insurance and Financial Services. *Bridge Magazine* analyzed that data in partnership with *Crain's* to examine how personal injury protection drives up the cost of insurance in Detroit and its surrounding suburbs to some of the highest rates in the country.

Individual companies do not have to publicly disclose their annual claims data, leaving the industrywide reports as the only publicly available information about how much money insurers collect and spend on damaged vehicles and injured riders.

The industry data lags behind by three years as insurers adjust their losses based on collision claims and medical bills, an increasing number of which are settled in litigation that now accounts for two out of every five lawsuits filed in Michigan courts.

The skyrocketing premiums collected by insurers and losses incurred for medical costs corresponds with a **decade-long 130 percent statewide increase** in the number of lawsuits between drivers and their medical providers and auto insurance carriers.

At Bronson Healthcare Group, the Kalamazoo-area hospital system spent $1.3 million in the first six months of this year on lawyers chasing $6.6 million in unpaid bills from insurers that were eventually paid, said James "Chip" Falahee Jr., senior vice president of legal and legislative affairs at Bronson.

"Sometimes insurance companies take positions that are so out there, that the courts say, 'No, that is a specious defense' and they have to pay," Falahee said.

The costly litigation can vary year to year, causing unexpected spikes in losses and subsequent rate increases by insurers.

In 2012, the cost per injured driver hit a high-water mark of $83,800 per claim, as the industry as a whole reported spending $3.76 billion for personal injury protection benefits compared with about $2.6 billion in premiums collected.

By comparison, Florida's costliest year was 2010, when insurers in the Sunshine State shelled out $2.84 billion for eight times as many injury claims as Michigan had in 2012.

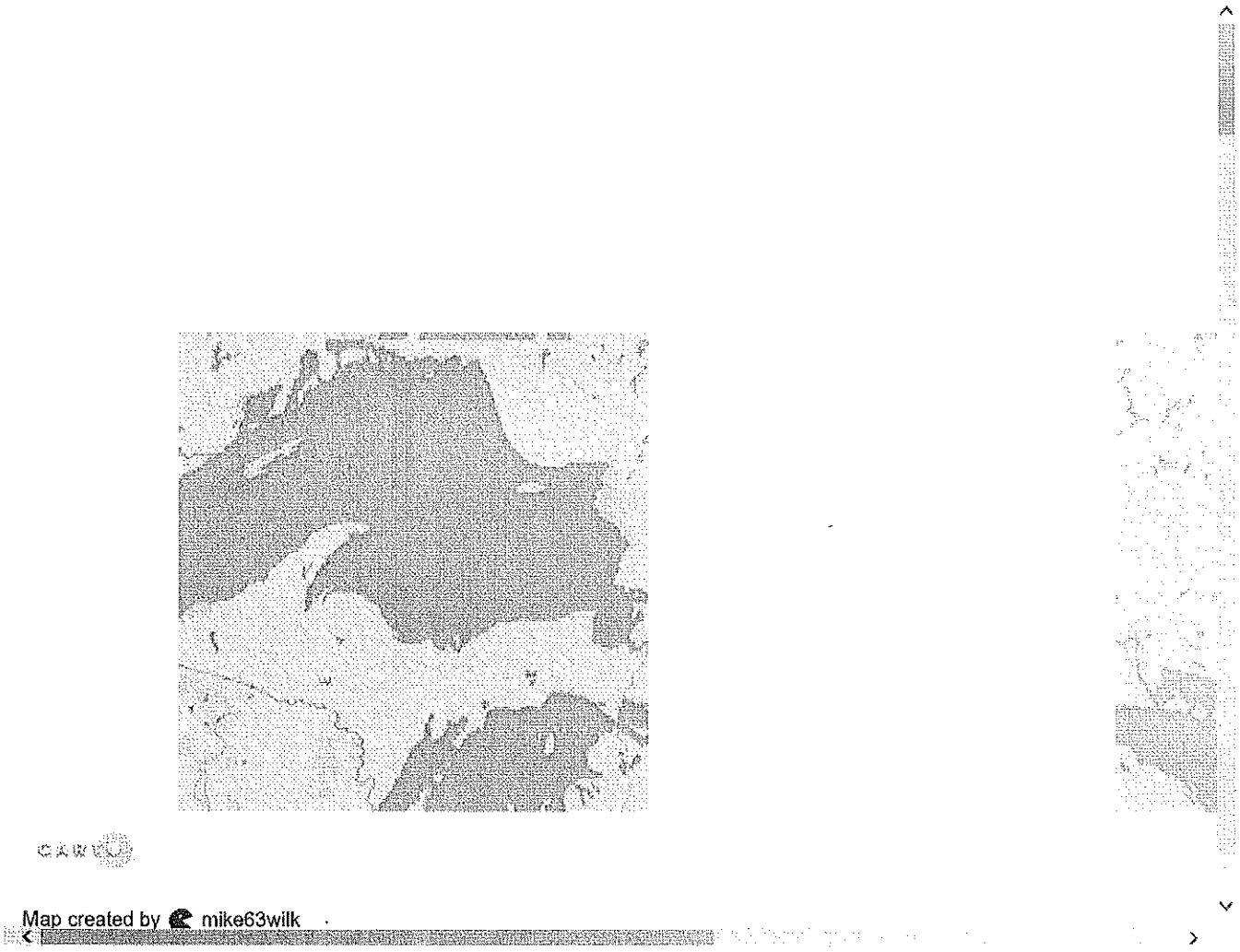
Put differently, Michigan insurers spent $1.46 on medical costs in 2012 for every dollar they collected. Florida's insurers spent 75 cents of every dollar they collected for personal injury claims.

"That's not sustainable," said Lynch, the insurance industry actuary. "Insurance companies have other expenses. Agents make commissions. Then you've got your internal expenses."

Crushing car insurance costs

Motorists in Detroit and much of the metro area — as well as those in the Flint area — are charged substantially more for car insurance because of where they live. All insurers, based on claims histories, opt to charge motorists more for most types of

coverage. But in Detroit, costs for personal injury protection — which in Michigan has no dollar cap, unlike all other states — generates the biggest extra charges. Here is the map for AAA; other carriers show similar territorial rate differences.



Auto insurance industry losses

For the overall insurance industry in Michigan, private passenger auto insurance has become a perennial money loser, while other lines of property and liability insurance remain profitable.

The industry as a whole reported an average loss of 2.9 percent on auto insurance between 2005 and 2014, turning a profit in just three of the last 10 years, according to profit-and-loss data all insurers submit annually to the National Association of Insurance Commissioners.

"In Michigan, when it comes to auto (insurance), it's a losing proposition," said Pete Kuhnmuench, executive director of the Insurance Institute of Michigan, the industry's lobbying arm in Lansing.

Between 2005 and 2014, insurance companies posted an average profit margin of 9.6 percent on workers compensation insurance that Michigan employers are required to purchase to cover the costs of workplace injuries.

In 2011, the insurance industry in Michigan reaped a 7.1 percent average profit on workers' compensation, while posting a 13.9 percent overall loss on auto insurance.

Unlike auto insurance, the workers comp system has a state-imposed schedule of rates doctors and hospitals get paid for treating injured workers.

"The reality is, yeah, insurance companies make money — they make money on work comp, for the most part," Kuhnmuench said.

But the largely unregulated nature of Michigan's "file and use" auto insurance system in which the state's insurance commissioner lacks the power to reject rate increases has fueled speculation that carriers are getting rich on the backs of motorists.

"In Michigan, the auto insurers have this cartel-like, wonderful business where we're required by law to purchase no-fault (coverage) but Michigan's insurance commissioner doesn't know what the profit margin is of the companies selling it," said Steven Gursten, a personal injury attorney at Michigan Auto Law in Farmington Hills. "I have a feeling that they're not losing money."

Industry data shows the insurance industry as a whole has softened the blow of medical losses in some years by collecting more premium dollars for collision, comprehensive and bodily injury than they experienced in claims. Michigan's auto insurance companies collectively posted annual profits in all three of those categories in the 14 years of publicly available reports analyzed by *Crain's*.

In 2010, for example, the industry reported an overall loss of $317 million on personal injury protection — at a cost of $61,000 per claim — while posting an overall $384 million profit. Before taxes and overhead, profits from collision coverage alone topped $454 million that year, the auto insurance data shows.

"Clearly, Michigan is a difficult place to do business for auto insurers," Lynch said. "If they were making tons of money, they wouldn't be trying to get the laws changed."

Bridge Magazine Reporter Mike Wilkinson contributed to this report.

- Editor's Note: This story has been corrected to reflect the fact that The National Association of Insurance Commissioners' annual data on Michigan's auto insurance industry includes the per-vehicle annual fee assessed for the Michigan Catastrophic Claims Association for personal injury protection costs exceeding $550,000. The fee is counted as an earned premium by insurers. And medical claims that exceed $550,000 are counted as incurred losses by insurers.
